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July 17, 2002

VIA ELECTRONIC FILING

Marlene K. Dortch
Secretary
Federal Communication Commission
445 12th Street, S.W.
Washington, D.C. 20054

Re: Reply Comments, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338

Dear Ms. Dortch:

Attached for filing in the above-captioned docket are the Reply Comments of NuVox, Inc., KMC Telecom, Inc., TDS MetroCom, Inc., Core Communications, Inc., and SNiP LiNK, LLC (the "CLEC Coalition").

Please do not hesitate to contact me with any questions or concerns regarding this matter: (202) 955-9890.

Sincerely,



Stephanie A. Joyce
Associate

Attachment

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Section 251 Unbundling)	
Obligations of Incumbent Local Exchange	)	CC Docket No. 01-338
Carriers)	
)	
Implementation of the Local Competition)	
Provisions of the Telecommunications Act of	)	CC Docket No. 96-98
1996)	
)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability)	

**REPLY COMMENTS OF
NuVOX INC.
KMC TELECOM, INC.
TDS METROCOM, INC.
CORE COMMUNICATIONS, INC.
AND SNIPLINK, LLC**

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July 17, 2002

SUMMARY

The Commission must respond to the Court of Appeals' remand by adopting an unbundling framework that adheres to the Supreme Court's interpretation of Congress' core procompetitive objectives while enabling a focused, detailed impairment analysis under clear federal guidelines. In accordance with its plenary jurisdiction to oversee the implementation of the 1996 Act, which is exemplified in the TELRIC and Section 271 review constructs, the Commission should create a federal unbundling framework with clear criteria for determining whether competitors are impaired without access to ILEC monopoly networks on an unbundled, cost-based basis. This framework will facilitate thorough review of the prevailing competitive landscape as the Court of Appeals requires.

The State Commissions are likely best equipped to conduct impairment analysis in accordance with the FCC's federal unbundling directives. Under the framework proposed herein, a truly granular unbundling analysis requires the expertise and resources that State Commissions collectively provide. These State Commissions should thus retain their historical authority under the 1996 Act to impose unbundling obligations in addition to those currently recognized by the FCC's existing rules. In order to preserve a uniform interpretation of the minimum obligations required by the Act, however, State Commission decisions that find a particular element should no longer be unbundled must be reviewed and affirmed by the FCC prior to their adoption in that state. This review construct is akin to the process applied to Section 271 applications and will best ensure that impairment analysis is conducted in accordance with Congress's procompetitive intent and is not compromised by resource issues or politics at the state level.

The Commission's impairment guidelines must comport with Congress's mandate that ILEC networks must be opened to competitors so that competition in a decisive and

irreversible way. Thus, the new federal guidelines must be premised on a presumption that unbundling is necessary, as Congress viewed cost-based unbundled access to ILEC networks as the cornerstone of competition. Accordingly, the presumption for unbundling requires that an element must be unbundled unless it can be shown that actual network element substitutes, having the same functionalities and capabilities of ILEC unbundled network elements (“UNEs”), are available to competitors today as a practical, economic, and operational matter. To ensure that such a showing is made, the Commission should require that the burden of proof for removing an unbundling obligation, and demonstrating the actual availability of alternatives, rests on the party advocating its removal.

Further, the presumption in favor of unbundling should not be diminished by a perceived need to stimulate ILEC investment in the network or in broadband services, as the Supreme Court has found that such investment has thrived pursuant to, and as a result of, cost-based unbundling.

Nor should the Commission craft an unbundling standard that considers the presence of other technologies and services, which are not even referenced in Section 251 and are not compatible with the wireline network (assuming that they are available to CLECs at all), as evidence that unbundling is not required. Finally, the Commission should find that the use of automatic “triggers” or “sunsets” for removing unbundling obligations fails to comport with both Congress’s insistence on unbundling and the Court of Appeals’ demand for a more granular fact-based analysis.

The Commission’s forthcoming impairment standard must be applied to the existing list of unbundled network elements (“UNEs”) as they are presently required. The Court of Appeals did not vacate the Commission’s unbundling rules, but only remanded them, as the

Commission has expressly acknowledged. Moreover, the presumption for unbundling that is clear in Section 251 requires that the Commission take a “top-down” approach to the network, presuming that the components it earlier recognized as needed for competition should remain unbundled.

As is demonstrated here and in the CLEC Coalition’s initial comments, competitors would, by any reasonable standard or measure, still be impaired today if they were denied access to the UNEs that the Commission has listed in individual and combined form. And if any changed circumstances have developed, they only further demonstrate that there are perhaps fewer alternatives to ILEC UNEs available today, and that CLECs are even less able to self-provision elements than they were in 1999. The so-called UNE Fact Report, which is a compilation of largely irrelevant information that is otherwise riddled with errors, fails entirely to demonstrate that actual UNE alternatives are available and thus cannot serve to refute these conclusions.

The record in this proceeding demonstrates that members of the CLEC Coalition would be impaired without access to (1) dedicated transport, in both lit and dark form, (2) all loops, including T1s, xDSL-capable loops, and complete loops with electronics where served out of remote terminals, in both lit and dark form, (3) enhanced extended links (“EELs”), (4) Operations Support Systems (“OSS”), and (5) signaling and call-related databases. These elements represent the bare minimum of facilities that the fiber/switch-based members of the CLEC Coalition must obtain from ILECs in order to serve their existing customers and to expand the reach of their networks to new ones. The CLEC Coalition has shown that they are unable to obtain these elements from third parties in a manner even approaching the ubiquity, quality or operational utility of the ILECs’ monopoly networks. Further, we have

demonstrated that self-provisioning these elements is tremendously difficult, if not impossible, given the tremendous cost and delay inherent in building out facilities and the current state of the capital markets. As such, the record demonstrates that these UNEs must remain available to competitors at cost-based rates.

Finally, the Commission's unbundling framework should include specific transitional mechanisms to ensure regulatory and market stability. In the event that unbundling obligations should change, carriers must have assurances that they have time to alter their business plans accordingly, without disruption to their networks or, more importantly, to customer service. Thus, competitors must be permitted to avail themselves of increased unbundling obligations, particularly for EELs, by amending existing agreements and provisioning arrangements, without having to pay any termination penalty or nonrecurring charges other than a cost-based conversion fee. In addition, should a UNE ever be removed from the list in any market or state, the Commission should order that any UNE already in place or on order is provisioned as a UNE under TELRIC pricing. These elements must continue to be provisioned by the ILECs until State Commissions approve alternative tariffs that ensure the availability of elements at nondiscriminatory and just and reasonable terms. Finally, to preserve the finality of its rules, the Commission should adopt a "quiet period" on all its unbundling rules, including a zero-tolerance policy for any attempt to change the rules after the close of the reconsideration period. As the Chairman has recognized, only with final, stable rules can new entrants effectively plan networks and provide competitive services to end users. The proposals made by the CLEC Coalition herein will provide that much-needed finality and stability and allow them to adjust and implement business plans capable of bringing the benefits of competition to an ever greater number of consumers.

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**REPLY COMMENTS OF
NUVOX INC.; KMC TELECOM, INC.; TDS METROCOM, INC.;
CORE COMMUNICATIONS, INC.; AND SNIPLINK, LLC**

NuVox Inc. (“NuVox”); KMC Telecom, Inc. (“KMC”); TDS Metrocom, Inc. (“TDS Metrocom”); Core Communications, Inc. (“CoreTel”);¹ and SNIPLINK, LLC (“SNIPLINK”), (hereinafter the “Fiber/Switch-Based CLEC Coalition,” “Coalition,” or “Joint Commenters”),² through counsel, hereby submit their joint reply comments in this proceeding under which the Commission will review its existing unbundling standard and rules,³ now on remand from the D.C. Circuit Court of Appeals in the case *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (“*USTA*”).

¹ CoreTel was not a party to the CLEC Coalition Initial Comments. CoreTel is a CLEC founded in 1997 that provides innovative high-speed Internet access services and managed modem services in Delaware, Maryland, and Pennsylvania.

² Each coalition member has deployed its own fiber or switching equipment, or both.

³ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 01-361 (rel. Dec. 20, 2001) (“*NPRM*”).

I. INTRODUCTION

Without question, the D.C. Circuit's decision in *USTA* changes somewhat the parameters of the unbundling inquiry – for as long as the decision stands. What is also without question, however, is that the Supreme Court of the United States believes that Congress intended for the Commission to implement Section 251 in an assertively procompetitive manner as a means of replacing telecommunications monopolies with competitive markets. The Commission's task in adhering to both of these decisions is admittedly complex. Nevertheless, the Commission must carefully consider the guidance from both courts as it reconsiders how best to implement and enforce Section 251.

1. The D.C. Circuit did not vacate the UNE rules, the current list remains the baseline for review

This review on remand must approach the unbundling rules as a “top-down” proposition. The Court of Appeals choose not to vacate the *UNE Remand Order*,⁴ but only to remand it. In leaving the Commission's list of elements intact, the Court of Appeals essentially told the Commission that its unbundling analysis required further fine tuning.⁵ This message in no way requires the Commission to begin from a blank slate when adopting a modified interpretation and application of the impairment standard. Nor does it require the Commission to build a case for every UNE from scratch. Rather, the D.C. Circuit instructed the Commission to revisit the current list with a more “concrete” threshold for what constitutes “impairment” under Section

⁴ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, 15 FCC Rcd. 3696 (1999) (“*UNE Remand Order*”).

⁵ Compare *WorldCom v. FCC*, 246 F.3d 690, 696 (D.C. Cir. 2001) (vacating *Advanced Services Order* on the grounds that the FCC had not articulated why the 1996 Act gave it exclusive jurisdiction over DSL service) with *Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001) (remanding only the portion of the *CALLS Order* that allocated \$450 million in access charges to the Universal Service Fund, on the ground that the FCC had not performed its own analysis as to the proper amount).

251.⁶ Notably, the “impairment” standard must remain a more permissive standard than the “necessary” standard.⁷ The Commission should therefore begin with its existing impairment analysis and the current UNE list, as the baseline for its review and its response to the Court of Appeals.

2. Congress created a presumption for network unbundling as a means to level the tremendous advantages inherent to the incumbents’ historical and continuing monopoly status

The Supreme Court has made clear its reading of the 1996 Act as an aggressively procompetitive instrument for breaking up ILEC monopolies. Characterizing Congress’ intent as “to reorganize markets by rendering regulated utilities’ monopolies to interlopers,”⁸ the Supreme Court upheld both the Total Element Long-Run Incremental Cost (“TELRIC”) methodology and the UNE combination rule – two of the Commission’s most controversial local competition rules – as reasonable implementations of the 1996 Act.⁹ The *Verizon* opinion is replete with findings that Congress’ principal intent was to diminish the ILECs’ “almost insurmountable competitive advantage”¹⁰ as “inheritors”¹¹ of the network, such that the Commission must *assume* a decidedly *un-level* playing field and adopt rules to change it.

⁶ *USTA*, 290 F.3d at 425 (“we believe it must point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible”).

⁷ The Commission has argued in seeking rehearing of the *USTA* appeal that the Court of Appeals improperly suggests that the more stringent “necessary” standard should be applied to all UNEs, regardless of whether they are proprietary. Case Nos. 00-1012 *et al.*, Petition for Rehearing or Rehearing *En Banc* at 11-12 (filed July 8, 2002) (“FCC Petition for Rehearing”).

⁸ *Verizon Communications v. FCC*, 122 S. Ct. 1646, 1661 (2002) (“*Verizon*”).

⁹ *Id.*, 122 S. Ct. at 1681 (TELRIC), 1687 (combinations).

¹⁰ *Id.*, 122 S. Ct. at 1662.

¹¹ *Id.*, 122 S. Ct. at 1654.

According to the Supreme Court, incumbents are not to be accorded leniency in this process on the ground that their monopoly ratebase is at stake.¹² To the contrary, the entire purpose of the 1996 Act is to devise an environment in which ILECs are “vulnerable to interlopers”¹³ who will take their customers unless they compete on the merits, and not by virtue of their “bottleneck control”¹⁴ over the network. Thus, the Commission must interpret the 1996 Act as creating a *presumption for opening the network* despite ILEC attempts to upend the presumption and rewrite legislation.

3. The Supreme Court has rejected the contention that unbundling discourages network investment and found that Congress instead chose competition as a means of spurring investment

In upholding TELRIC, the Supreme Court flatly rejected ILEC arguments that cost-based unbundling discourages network investment.¹⁵ Making short order of the ILEC contention that “TELRIC perversely creates incentives against competition in fact,” the Court answered simply that “actual investment in competing facilities since the effective date of the Act simply belies the no-stimulation argument’s conclusion.”¹⁶ The Court went on to rebut the ILECs by

¹² *Verizon*, 122 S. Ct. at 1679 (rejecting ILEC arguments of stranded investment as grounds for vacating TELRIC methodology, noting that their presentation “is spurious because the numbers assumed by the incumbents are clearly wrong”).

¹³ *Id.*, 122 S. Ct. at 1661.

¹⁴ H.R. Rep. No. 104-204, 104th Cong., 2d Sess. at 49 (1996) (“House Report”).

¹⁵ In so doing, the Supreme Court also put asunder one of the Bells’ core Triennial Review offensives. As the CLEC Coalition asserted in its Initial Comments, CLEC Coalition Comments at 10, the Bells’ comments proved that their concern has less to do with the unbundling rules and more to do with pricing which is not under review in this proceeding. BellSouth Comments at 10, (stating that the 488% growth in the number of local carriers is attributable only to unreasonable TELRIC rates that permitted CLEC arbitrage), at 12 (arguing that TELRIC made it difficult to recover network investment); Qwest Comments at 4 (arguing that states have adopted UNE rates “beyond any plausible interpretation of TELRIC costs”); SBC Comments at 6 (contending that Section 271 decisions are driving UNE rates “to the lowest common denominator”); Verizon Comments at 32-34 (arguing that TELRIC rates stifle ILEC investment). Moreover, having finally withstood six years of ILEC litigation, the FCC should at no time soon consider reopening the standard. If there is one remaining bastion of regulatory certainty in the complex landscape of local competition it must be that TELRIC remains and will remain firmly in place.

¹⁶ *Verizon*, 122 S. Ct. at 1668-69.

summarizing evidence showing that competitors have invested \$55 billion in facilities since passage of the 1996 Act.¹⁷ It also noted that the “incumbents have invested ‘over \$100 billion’ during the same period.”¹⁸ This astronomical figure prompted the Court to conclude that “it suffices to say that a regulatory scheme that can boast such substantial competitive capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities.”¹⁹

This conclusion should relieve the Commission’s perceived obligation to provide incentives to ILECs to increase their network investment.²⁰ Instead, the Commission should remain confident that its unbundling policy has helped create the competition that makes investment by all carriers possible and advantageous. Accordingly, it should address this remand with the belief that unbundling is a pro-investment, pro-market policy.

4. Congress did not expect that competitors would be forced to self-provision network elements

Network build-outs are complicated, costly, and time-consuming, even for a well-funded incumbent carrier. When the carrier is a new entrant that must gain consumer and investor confidence in the face of ever-changing regulations and ILEC brand recognition, network buildouts are Herculean efforts. This is not news: Congress wrote Section 251 with this understanding. The legislative history to the 1996 Act states that

¹⁷ *Id.*, 122 S. Ct. at 1676.

¹⁸ *Id.*, 122 S. Ct. at 1676 n.33 (quoting dissent of Breyer, J.).

¹⁹ *Id.*

²⁰ *E.g.*, NPRM, ¶ 23 (“Some parties have argued that . . . requiring incumbents to unbundled new or upgraded facilities may discourage them from investing in those facilities in the first place.”). BellSouth and Qwest in fact concede that the “uncertain” consumer demand for broadband services has inhibited deployment. Qwest Comments at 48. *See also* BellSouth Comments at 35. The Commission itself has recognized that “consumer responses” to the availability of advanced services “are continuing to evolve.” *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, CC Docket 98-146, FCC 02-33 ¶ 5 (rel. Feb. 6, 2002) (“Third Broadband Report”).

This conference agreement recognizes that it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant. Some facilities and capabilities (*e.g.*, central office switching) will likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251.²¹

The Supreme Court concurs that “replicating the incumbent’s entire existing network, the most costly and difficult part of which would be laying down the ‘last mile’ of feeder wire,” presents difficulties that place CLECs at great disadvantage vis à vis ILECs.²² With the current tightening of the capital markets, the task has become even more daunting.²³

It is therefore unreasonable to expect CLECs to self-provision their own networks to such a degree that unbundling of network elements is no longer necessary. As the CLEC Coalition will explain herein, the competitive industry had little chance of amassing the capital required to build out ubiquitous and redundant networks.²⁴ With the Commission’s rules constantly under challenge and judicial review, and more importantly the current financial freeze that has taken hold throughout the telecommunications sector, placing the onus on competitors to replicate the ILECs’ networks would simply undermine Congress’ intent. Thus, contrary to SBC’s utterly preposterous suggestion, CLECs and ILECs do not “stand in the same shoes” from this point forward;²⁵ the 1996 Act has barely begun to take hold.²⁶

²¹ House Conf. Rep. No. 104-458, Joint Explanatory Statement, 104th Cong., 2d Sess. at 148 (1996) (“Joint Explanatory Statement”).

²² *Verizon*, 122 S. Ct. 1662.

²³ SBC’s contention that the “the entire sector is hurting,” SBC Comments at 5, may be true, but it is without question that the competitive industry has taken the worse hit, by orders of magnitude.

²⁴ See Reply Declaration of Edward J. Cadieux, Vice President of Regulatory and Public Affairs, NuVox, Inc. (July 16, 2002) (appended hereto) (“Cadieux Reply Aff.”). See also AT&T Comments at 42-43, 142 (identifying rights-of-way difficulty as inhibitor of CLEC build-outs); WorldCom Comments at 19 (regarding same).

²⁵ SBC Comments at 12.

²⁶ See, *e.g.*, WorldCom Comments at 25.

The Commission should thus reject ridiculous ILEC assertions that the time for unbundling has ended, and that requiring full “facilities-based” competition is the only legitimate policy.²⁷ Rather, it should be mindful of the rocky start that its implementation of the 1996 Act endured over the past six years, as well as the market realities that CLECs have faced as they have begun to compete and struggled to keep their business plans funded at the same time.²⁸

The CLEC Coalition sets forth these principles to offer additional grounding for the Commission’s revisitation of Section 251.²⁹ It does not here propose the definitive new unbundling standard. Rather, these comments frame a loose construct for the Commission’s action here on remand, based on the premise that the Commission’s *UNE Remand* unbundling framework needs only slight modification (or a more rigorous application and explanation) to satisfy the Court of Appeals’ remand, as well as a modified means of conducting a more granular review of local market conditions. This construct focuses on the establishment of a review process that capitalizes on the Commission’s historical role as the national telecommunications policy-maker, and suggests that the Commission in turn rely on the State Commissions in their roles as finders of fact. Thus, the CLEC Coalition believes that the Commission’s first task in this proceeding is to adopt guidelines for the “necessary” and “impair” standards of Section 251, modified only to the extent deemed necessary, if at all, to comply with the Court of Appeals’

²⁷ See, e.g., *NPRM*, ¶ 9 (the Commission will consider “whether the [unbundling] obligation is likely to promote facilities-based competition, investment, and innovation”). See also BellSouth Comments at 9; SBC Comments at 8; Verizon Comments at 27-30. Chairman Powell has also stated that “I am guided by a strong belief in facilities-based competition.” Remarks of Michael K. Powell to the Association for Local Telecommunications Services (Nov. 30, 2001) (“*Powell ALTS Address*”).

²⁸ Not one of the members of the CLEC Coalition think they have a bad business plan. Indeed, each is poised to succeed provided the Commission ensures the proper regulatory environment in which new entrants can access capital and network elements needed to bring the benefits of competition to consumers and their investors.

²⁹ The principles set forth in the Coalition’s Initial Comments remain firm as well. See CLEC Coalition Comments at 8-18 (section entitled “The Big Picture”).

remand. From there, the Commission should create a review framework that allows states to apply those federal guidelines to their respective competitive landscapes, with the Commission's oversight. The CLEC Coalition thus focuses not on the economic theories that appeared to intrigue the Court of Appeals, to the point of distraction, but rather on the procompetitive construct of the statute that appeared to intrigue Congress.

II. THE FCC MUST RESPOND TO THE COURT OF APPEALS' REMAND IN A MANNER THAT IS FULLY CONSISTENT WITH CONGRESS' MANDATES AND THE SUPREME COURT'S DECISION IN *VERIZON*

The Court of Appeals' decision in *USTA* has transformed this proceeding from a review of existing UNE rules to a remand of the Commission's implementation of the Section 251 "necessary" and "impair" standards for unbundling. Although the UNE rules remain intact pending this remand,³⁰ the Commission is now required to revisit its unbundling framework in a more detailed or "more granular" manner in order to determine that CLECs are impaired without access to a particular network element. This review on remand cannot fail to adhere to the clear findings of the Supreme Court in its decision upholding the Commission's TELRIC pricing methodology and UNE combination rules in *Verizon* — although many believe the D.C. Circuit itself did not comport with that decision.³¹ That Supreme Court decision states in several instances that Congress imposed on the Commission the duty to require incumbents to unbundle the local network in a way that enables competition to take hold in a meaningful way; the

³⁰ The Court of Appeals only remanded the UNE rules to the Commission but did not vacate the *UNE Remand Order*. *USTA*, 290 F.3d at 428, 430. Chairman Powell has acknowledged that "the current state of affairs for access to network elements remains intact." *Statement of FCC Chairman Michael Powell on the Decision by the Court of Appeals for the District of Columbia Regarding the Commission's Unbundling Rules*, News Release (May 24, 2002).

³¹ The Commission has sought rehearing of the *USTA* decision in part because "the panel's decision is, at a minimum, fundamentally in tension with recent and pertinent Supreme Court authority dealing with closely related substantive requirements of the 1996 Act." FCC Petition for Rehearing at 1.

Commission must adhere to those principles in this remand by adopting an unbundling framework that ensures both a “granular” and a procompetitive implementation of Section 251.

A. The Supreme Court Has Instructed the FCC That Incumbents Have an Absolute Duty to Unbundle Their Networks

The overriding theme in the Supreme Court’s review in *Verizon* is that Congress intended the 1996 Act to prohibit ILECs from retaining both their monopoly status and their monopoly advantage over the local telecommunications network. Finding that Congress’ “approach was deliberate” for “rendering regulated utilities’ monopolies vulnerable to interlopers,”³² the Supreme Court upheld TELRIC on the merits as a reasonable implementation of the cost-based pricing mandates in Section 252.³³ In fact, the Court found that any costing methodology that set rates above confiscatory levels would comport with Congress’ mandates.³⁴

The Supreme Court took this aggressive stance based on its observation that ILECs “have an almost insurmountable competitive advantage” over new entrants.³⁵ Through their “control of this local market,”³⁶ ILECs have a 100-year head start on network deployment: “A newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent’s entire existing network[.]”³⁷ Although the Court does not expressly rely on legislative history to the 1996 Act for this finding, it echoes Congress’ own recognition that incumbents retain a significant competitive advantage in having inherited complete,

³² *Verizon*, 122 S. Ct. at 1661.

³³ *Id.*, 122 S. Ct. at 1681.

³⁴ *See id.*, 122 S. Ct. at 1661 (“The Act thus appears to be an explicit disavowal of the familiar public-utility model of rate regulation . . . in favor of novel ratesetting designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents’ property.”).

³⁵ *Verizon*, 122 S. Ct. at 1662.

³⁶ *Id.*

³⁷ *Id.* Under this rationale, the Commission’s criterion that values the ubiquity of network elements as a reason for unbundling remains eminently reasonable and consistent with the specific (unbundling) and general (opening monopolies to competition) mandates of Section 251. *UNE Remand Order*, 15 FCC Rcd. at 3744, ¶ 98.

functioning local networks.³⁸ For this reason, the Court found, the 1996 Act “proceeds on the understanding that incumbent monopolists and contending competitors are unequal” and imposes on ILECs a greater duty to interconnect and unbundle than would be required of requesting carriers, including CLECs.³⁹

The Commission, as it revisits the impair standard on remand, must not forget that, at bottom, ILECs are vastly better armed for local competition than are CLECs. The fact that some CLECs have entered the market successfully does not indicate that ILECs have lost their “almost insurmountable competitive advantage.”⁴⁰ Indeed, the Supreme Court was well aware of the presence of competition that had developed over the past six years and applied a decidedly pro-competitor read of the 1996 Act nonetheless. Therefore, in allowing for the more detailed, market-specific analysis that the D.C. Circuit appears to require, and which the *NPRM* itself appeared to contemplate,⁴¹ the Commission must continue to view the 1996 Act as an aggressively pro-competitor tool for prying open local markets by sharing the benefits of incumbency, and not simply a carrier-neutral exhortation to establish local competition.

B. The Court of Appeals’ Remand Requires a More Granular Analysis That Can Be Performed Best by the States, With FCC Direction and Review

Despite compelling reasons set forth in the Commission’s local competition orders, the D.C. Circuit appeared to find that the Commission’s creation of a uniform national UNE list is

³⁸ House Report at 49.

³⁹ *Verizon*, 122 S. Ct. at 1684. SBC’s complaint that the Commission requires ILECs to unbundle but has not mandated cable open access is thus answered simply by the fact that Congress established a law requiring unbundling, and the Commission is bound to follow it. SBC Comments at 56.

⁴⁰ *Verizon*, 122 S. Ct. at 1662.

⁴¹ *NPRM*, ¶ 35.

unsupportable under the unbundling parameters provided in Section 251.⁴² That is, the Court appeared to reason that Section 251 requires that the Commission conduct a detailed fact-based inquiry into the levels of competition in each market rather than adopt a uniform national UNE list based on “its belief in the beneficence of the widest unbundling possible . . . detached from any specific markets or market categories.”⁴³

The *USTA* Court also criticized the Commission for employing a concept of cost disparities that was not sufficiently focused on comparing actual CLEC costs of provisioning with ILEC costs of unbundling.⁴⁴ Casting aside judicial restraint and deference to the expert agency, the rogue Court found that the Commission’s adoption of an impairment standard that queried only as to whether CLEC costs of service were raised absent UNE access was “too broad . . . to be reasonably linked to the purpose of the Act’s unbundling provisions.”⁴⁵ Thus, even though the Commission elevated its impairment standard to the level of “materially” diminishing CLEC’s ability to offer service, it had not done the economic analysis to determine not only the effect of unbundling on CLECs, but also the “cost differentials that would make genuinely competitive provision of an element’s function wasteful.”⁴⁶ While the CLEC Coalition does not accept that this analysis, which curiously relies more on Justice Breyer’s dissent in *AT&T v. Iowa Utilities* than the actual majority opinion by Justice Scalia, is correct, the Court of Appeals’ demand that the Commission conduct a more searching and granular unbundling analysis must nevertheless, for the time being, form the basis for the Commission’s ongoing review.

⁴² See *USTA*, 290 F.3d at 422 (1999) (“[T]he Commission chose to adopt a uniform national rule, mandating the element’s unbundling in every geographic market and customer class, without regard to the state of competitive impairment in any particular market.”).

⁴³ *USTA*, 290 F.3d at 425-426.

⁴⁴ *Id.*, 290 F.3d at 427.

⁴⁵ *Id.*, 290 F.3d at 427.

⁴⁶ *Id.*, 290 F.3d at 427.

In order both to respond appropriately to the Court of Appeals' remand in *USTA* and to comport with the Supreme Court's rationale in *Verizon*, the Commission should adopt an unbundling framework that best ensures focused, detailed, fact-based application of the impairment standard. As the CLEC Coalition and several other parties stated in their Initial Comments, such inquiry is more readily performed by State Commissions, which have the more intimate knowledge of their local market conditions and typically have more resources and better procedures for this type of review than does the Commission.⁴⁷ For its part, the Commission, in keeping with its role as chief implementation agency for the 1996 Act,⁴⁸ should provide the states with clear federal guidelines on the meaning and scope of Congress' "necessary" and "impair" standards.⁴⁹ This type of framework is both legally sound and administratively practicable, as explained herein: the framework borrows heavily from the TELRIC regime, which the Supreme Court upheld in *Verizon* as a reasonable implementation of Section 252 pricing mandates.⁵⁰

State Commissions, as several commenters noted, have always retained the right to implement Section 251 unbundling rules;⁵¹ now, to answer the D.C. Circuit's remand, that approach is all the more necessary. Consistent Commission policy has provided that states may add network elements to the UNE list as they deem necessary to spur competition in their

⁴⁷ CLEC Coalition Comments at 68-69; *see also* AT&T Comments at 246; Kansas Corporation Commission Comments at 4; Louisiana Public Service Commission Comments at 2; Massachusetts Department of Telecommunications and Energy Comments at 5; Michigan Public Service Commission Comments at 4-5; Pennsylvania Public Utility Commission at 5; ZTel Comments at 87.

⁴⁸ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 ("We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out 'the provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996.").

⁴⁹ The CLEC Coalition outlines this impair standard in greater detail in Section III, *infra*.

⁵⁰ *Verizon*, 122 S. Ct. at 1681.

⁵¹ CLEC Coalition Comments at 68. *See also* California Public Service Commission Comments at 103-107; National Association of Regulatory Utility Commissioners Comments at 6-10.

markets.⁵² Conversely, however, states have not previously been deemed authorized to remove elements from the UNE list, as such action could deny CLECs “the benefits of scale economies in obtaining access to unbundled elements” or “the ability . . . to raise capital.”⁵³ The Commission should adopt an unbundling regime that retains these core procompetitive concepts while incorporating successful elements of both the TELRIC and 271 regulatory schemes.

The CLEC Coalition therefore suggests that the Commission craft rules that permit State Commissions to retain and add elements to the UNE list, consistent with its federal impairment standard. Based on their fact-specific application of the Commission’s unbundling rules, states also should be permitted to respond to local market developments by recommending removal of UNEs from the current list. However, where a state seeks to remove a UNE from the existing list, the Commission must treat the decision like a 271 recommendation and review and approve the decision prior to its implementation.

Just as the Section 271 review process requires final Commission approval of applications for interLATA relief to ensure that the competitive checklist has been satisfied,⁵⁴ this proposal incorporates Commission review to ensure that its unbundling rules have been followed properly and have not been compromised in any way. This review process, explicitly required in Section 271, echoes the general theme in the 1996 Act that the Commission must retain oversight over local competition throughout the nation. In keeping with its supervisory role, the Commission has overruled the determinations of RBOC home states that the applicant

⁵² *UNE Remand Order*, 15 FCC Rcd. at 3762-63, ¶ 145; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. at 15567, ¶ 136 (1996) (“*Local Competition First Report and Order*”). See also 47 U.S.C. § 251(d)(3) (Commission shall not preempt state action consistent with its Section 251 rules).

⁵³ *Local Competition First Report and Order*, 11 FCC Rcd. at 15624, ¶ 242.

⁵⁴ 47 U.S.C. §§ 271(d)(1), (d)(3).

has complied with Section 271 and denied interLATA relief.⁵⁵ In other instances, the Commission has adopted the home state's positive recommendation but has granted a Section 271 application only with the condition that the RBOC implement aspects of its provisioning in other 271 states. For example, the Commission approved Southwestern Bell's ("SWBT's") Section 271 application for Kansas and Oklahoma because it had adopted UNE rates similar to those that were included in its earlier approved application for Texas.⁵⁶ A similar adoption of the Texas 271 approval enabled SWBT to obtain Section 271 approval in Missouri and Arkansas.⁵⁷ In fact, the Commission has flatly stated that "[i]ndeed, in the appropriate circumstances, such as those described above, a state would be entitled to a presumption of compliance with TELRIC if it adopted [New York or Texas] rates in whole and could demonstrate that its costs were at or above the costs in that state whose rates it adopted."⁵⁸

⁵⁵ E.g., *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271 ¶¶ 20-22 (rel. Oct. 13, 1998); *Application of BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, Memorandum Opinion and Order, FCC 97-418 ¶¶ 30-32 (rel. Dec. 24, 1997).

⁵⁶ *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29 ¶ 2 (rel Jan. 21, 2001) ("*Kansas/Oklahoma 271 Order*") ("In particular, we commend both states for using the successful work of the Texas Public Utility Commission (Texas Commission) as a starting point for the development of their own section 271 reviews. This approach demonstrates that more rural states can conduct successful section 271 reviews without overwhelming their regulatory resources by building on the work of other states in their region."), ¶ 61 (Kansas UNE rates), ¶ 88 (Oklahoma UNE rates).

⁵⁷ *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri*, CC Docket No. 01-194, Memorandum Opinion and Order, FCC 01-338 ¶ 3 ("Using the model adopted in the SWBT Kansas/Oklahoma Order, both states have built upon the successful work of the Texas Public Utilities Commission (Texas Commission) which served as a starting point for the development of their own section 271 reviews."), ¶ 50 (Commission relied on OSS stress tests conducted in Texas to conclude that SWBT had satisfied the OSS checklist requirement in Arkansas and Missouri), ¶ 50 (noting adoption of Texas UNE rates in Missouri), ¶ 52 (noting with approval SWBT's adoption of A2A Interconnection Agreement Rates in Arkansas).

⁵⁸ *Kansas/Oklahoma 271 Order*, ¶ 82 n. 245.

In performing this type of review, the FCC will strike a balance between granularity and procompetitive uniformity: it will rely on State Commissions to perform the requisite detailed, fact-based review while ensuring that an appropriate minimum level of procompetitive regulation is applied in each state. As such, it will ensure that the D.C. Circuit's mandate for more focused unbundling review is followed.

III. THE FCC SHOULD CREATE GUIDELINES FOR STATE APPLICATION OF THE IMPAIR STANDARD THAT REFLECT CONGRESS' COMMITMENT TO OPENING UP THE LOCAL NETWORK AND DIMINISHING THE INCUMBENTS' NATURAL COMPETITIVE ADVANTAGES

The joint federal-state unbundling process described above must follow clear federal unbundling guidelines that accord full weight to Congress' intent in the 1996 Act, as interpreted by the Supreme Court. As the CLEC Coalition explained above, this result is easily accomplished through the Commission's articulation of the impair standard implementation guidelines that adhere to the Act's procompetitive principles. These principles require above all else that ILECs must – *are presumed to be required to* – unbundle the local network that they inherited⁵⁹ and continue to leverage into other services through improvements funded through their monopoly ratebases. On this premise, it becomes clear that the Commission cannot “trade” or “incentivize” ILEC broadband deployment through sacrificing unbundling. In addition, this presumption of unbundling requires that the Commission's rules place the burden of proof for removing a UNE from the existing list on the party advocating its removal. Finally, Congress' reliance on unbundling as the cornerstone of local competition prohibits the use of automatic “triggers” for relaxing the unbundling rules. Although they may be expedient, they do not afford the type of granular, fact-based analysis required in Section 251 and, more importantly, by the D.C. Circuit.

⁵⁹

See Verizon, 122 S. Ct. at 1654.

A. Congress Requires That the FCC Create Rules that Counterbalance or Diminish the Advantages That ILECs Enjoy Through Their Incumbent Status

It is evident in the 1996 Act that Congress was both cognizant of, and intended to reverse the effects of, the legacy advantages that ILECs have long enjoyed by virtue of their monopoly status. The language of Section 251 itself,⁶⁰ as well as the legislative history to the Act,⁶¹ indicate that the Commission is not to wait for these advantages simply to be diminished by “market forces,” but it must affirmatively adopt rules that remove them from the outset. For these reasons, the Supreme Court affirmed the Commission’s UNE combination rules as a means “to remove practical barriers to entry”⁶² and immediately “put a competing carrier on an equal footing with the incumbent.”⁶³

The legislative history of the 1996 Act indicates in several instances that Congress sought to dismantle and distribute the advantages accrued by the ILECs during their 100 plus charmed years as government-sanctioned monopolies. The House Report notes that “[i]n providing local telephone service, telephone companies have historically been protected from competition by State and local government barriers to entry.”⁶⁴ As a result of their “government-sanctioned-monopoly status,” the House states, the ILECs retain “bottleneck control over the essential facilities⁶⁵ needed for the provision of local telephone service.”⁶⁶ Congress expressly noted that,

⁶⁰ See *Verizon*, 122 S. Ct. at 1684 (noting that Section 251(c) is entitled “Additional obligations of incumbent local exchange carriers” and reasoning that this title expresses Congress’ understanding that “monopolists and competitors are unequal”).

⁶¹ E.g., House Report at 49, 89.

⁶² *Verizon*, 122 S. Ct. at 1685.

⁶³ *Id.*, 122 S. Ct. at 1687. Notably, the ILECs’ use of combinations is never subject to use restrictions.

⁶⁴ House Report at 49.

⁶⁵ Congress’ use of the term “essential facilities” here has not been deemed by the Commission or the courts to connote the application of strict antitrust essential facilities doctrine to Section 251 unbundling. *UNE Remand Order*, 15 FCC Rcd. 3696, 3728, ¶ 58. See also *Iowa Utils.*, 366 U.S. at 388 (“The incumbents argue that §

because of this bottleneck control, “[t]he inability of other service providers to gain access to the local telephone companies equipment inhibits competition that could otherwise develop in the local exchange market.”⁶⁷

Further evidence of ILEC legacy dominance is their virtual carte blanche access to municipal rights-of-way and their frequent exemption from franchise requirements. These advantages illustrate what Congress termed “protect[ion] from competition by State and local government barriers to entry.”⁶⁸ The CLEC Coalition presented considerable insight on ILEC preferential treatment for rights-of-way and franchises through the affidavit of Joseph Polito of SNiP LiNK.⁶⁹ Mr. Polito explained that obtaining rights-of-way in SNiP LiNK’s home state of New Jersey has been a key cause of delay in entering new markets.⁷⁰ Not only does New Jersey give Verizon “blanket authority to use rights-of-way and pole attachments for building its local network without applying to the local municipalities for permission,”⁷¹ it has not adopted any rules to govern the procedures by which all other carriers must obtain that permission.⁷² Add to this the exclusive building access contracts that ILECs have been able to secure as a means of

251(d)(2) codifies something akin to the “essential facilities” doctrine of antitrust theory, see generally 3A P. Areeda & H. Hovenkamp, *Antitrust Law* §§ 771-773 (1996), opening up only those “bottleneck” elements unavailable elsewhere in the marketplace. We need not decide whether, as a matter of law, the 1996 Act requires the FCC to apply that standard; it may be that some other standard would provide an equivalent or better criterion for the limitation upon network-element availability that the statute has in mind.”). Even the *USTA* Court concedes that essential facilities is not the appropriate unbundling standard. *USTA*, 290 F.3d at 427.

⁶⁶ House Report at 49.

⁶⁷ *Id.* at 49.

⁶⁸ *Id.* at 49.

⁶⁹ Affidavit of Joseph Polito, SNiP LiNK, Inc., ¶¶ 4-7 (April 4, 2002) (“Polito Aff.”).

⁷⁰ See also AT&T Comments at 33 (citing rights-of-way problems as hindering deployment of all transmission facilities); WorldCom Comments at 135 (explaining that rights-of-way issues make self-provisioning of transport prohibitively difficult).

⁷¹ Polito Aff., ¶ 4 (SNiP LiNK).

⁷² *Id.*, ¶ 5. BellSouth is therefore completely incorrect when it states that ILECs must obtain rights-of-way in the same fashion as CLECs. BellSouth Comments at 69.

excluding competitors, and it becomes evident that rights-of-way remain a critical impediment to the development of local competition.⁷³

Section 251 unbundling obligations were accordingly directed toward the ILECs. Congress expressly differentiated between ILECs, which are deemed to have “market power,” and other local carriers to whom a lesser Section 251 standard applies.⁷⁴ Thus, “section 251(c) imposes several additional obligations on incumbent LECs.”⁷⁵ This “deliberate approach,” as the Supreme Court terms it,⁷⁶ is intended “to shift monopoly markets to competition as quickly as possible.”⁷⁷

The Commission’s implementation of the impairment standard must remain grounded in this legislative intent. The federal unbundling framework that will issue from this proceeding must therefore continue to impose meaningful access requirements on ILECs, that is, access to the network elements without which competitors’ ability to offer competing and innovative services is impaired.

B. The Supreme Court’s *Verizon* Opinion Indicates that Encouraging ILEC Broadband Deployment By Undercutting Congress’ Competitive Mandates Is Misguided

The Commission stated in the *NPRM* that one of its goals in this proceeding is to adopt unbundling rules that will provide incentives to incumbents to deploy new facilities and technologies.⁷⁸ In short, unbundling allows for competition that spurs investment by both

⁷³ *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, First Report and Order, FCC 00-366, 15 FCC Rcd. 22983, 22990, ¶ 11 (2000) (“*Competitive Networks Order*”). The rules promulgated in this order apply to prospective carrier contracts, prohibiting only new contracts with building owners that grant exclusive premises access. 47 C.F.R. § 64.2500.

⁷⁴ Joint Explanatory Statement at 117.

⁷⁵ *Id.* at 121.

⁷⁶ *See Verizon*, 122 S. Ct. at 1661.

⁷⁷ House Report at 89.

⁷⁸ *NPRM*, ¶ 23. *See also NPRM*, ¶ 4.

competitors and incumbents. As the CLEC Coalition and others explained in their Initial Comments,⁷⁹ the goal of encouraging deployment of advanced services cannot supercede the ILECs' settled statutory duty to unbundle the local network.⁸⁰ Neither the plain language of the 1996 Act nor the ILECs' actual deployment efforts provide any grounds for a conclusion to the contrary.

The 1996 Act encourages innovation and competition in both wireline voice and wireline high-speed data services. As the Commission itself has found, Section 251 has greater prominence in the Act than Section 706 as a regulatory tool.⁸¹ Moreover, voice and broadband services are linked and provided over integrated networks (of ILECs and CLECs) that typically rely on ILEC transmission connectivity between end offices and consumers. The concept of separate broadband networks is an ILEC myth that defies reality. All carriers' networks evolve, although those not subject to competitive pressures evolve more slowly. Network evolution is best accelerated by the Commission's fostering of competition in all areas of telecommunications. As Congress explained, the 1996 Act is "designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans *by opening all telecommunications markets to competition*["]."⁸²

Not only is the proposed "incentive" approach contrary to the 1996 Act, it is unnecessary to ensure broadband deployment in the first instance. The CLEC Coalition has demonstrated

⁷⁹ CLEC Coalition Comments at 11-13. *See also* AT&T Comments at 85; Covad Comments at 30; Dynegy Comments at 5; ALTS Comments at 32-33.

⁸⁰ *See Verizon*, 122 S. Ct. at 1661-62 *Verizon* at 1661 (noting Congress's "deliberate approach" of "rendering regulated utilities' monopolies vulnerable to interlopers").

⁸¹ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, 13 FCC Rcd. 24011, 24047-48, ¶ 77 (1998) ("Rather, the better interpretation of section 706 is that it directs us to use, among other authority, our forbearance authority under section 10(a) to encourage the deployment of advanced services. Under section 10(d), we may not use that authority to forbear from applying the requirements of section 251(c) and 271 prior to their full implementation.").

⁸² Joint Explanatory Statement at 113 (emphasis added).

that the Commission's broadband reports indicate that broadband deployment has occurred at satisfactory, or better than satisfactory, rates under the existing unbundling requirements. In the *Third Broadband Report*, which reviewed aggregate 2001 buildout data, the Commission stated that "industry investment in infrastructure to support high-speed and advanced services has increased dramatically since 1996."⁸³ This showing is even stronger than those of 1999 and 2000.⁸⁴ From this empirical evidence, it is unclear why the Commission should consider a trade-off between CLEC entry and unsecured promises of ILEC investment.⁸⁵

Moreover, if anything, ILEC capital expenditures have decreased since the CLEC industry has lost so many key players and competitive pressures have eased. Where the ILECs had increased their "capex" by 22 percent in the period from 1997 to 2000,⁸⁶ they have curtailed their 2002 spending by billions.⁸⁷ This decrease cannot be evidence of an investment disincentive, for their spending has gone down as the number of viable CLECs has dwindled.⁸⁸ Thus, in this context, the recent downturn in ILEC investment proves little more than that

⁸³ *Third Broadband Report* ¶ 62.

⁸⁴ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Second Report, 15 FCC Rcd. 20913, 20914 (2000) ("Second Broadband Report"); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, First Report, 14 FCC Rcd. 2398, 2402 (1999) ("First Broadband Report").

⁸⁵ See CLEC Coalition Comments at 11 n. 14, discussing SBC's failure to comply with merger condition requiring creation of out-of-region advanced services affiliates.

⁸⁶ See Federal Communications Commission, *Telecommunications @ the Millennium*, Figure 10 (Feb. 8, 2000) (BOCs invested \$82 billion from 1992 to 1995 and \$100 from 1997 to 2000).

⁸⁷ Verizon's capital expenditure budget for 2002 is at least \$1.4 billion less than its 2001 budget, and SBC will spend \$2 billion less in 2002 than it spent in 2001. *Verizon Communications Reports Solid Results for Fourth Quarter, Provides Outlook for 2002*, Verizon News Release (Jan. 31, 2002); *SBC Reports Fourth-Quarter Earnings*, SBC News Release (Jan. 24, 2002).

⁸⁸ Although they are far better situated than CLECs, ILECs, too (and in spite of guaranteed returns), are not entirely immune from the general business cycle.

Congress' was correct: the encouragement of competition will encourage investment in facilities.⁸⁹

C. Section 251 Focuses on the Local Wireline Network, Not Cable, Wireless or Satellite Networks, to Assess CLEC Need for Unbundled Elements

Section 251 requires the Commission to assess whether a competitive carrier would be impaired without access to the facilities of incumbent telephone monopolists in determining which network elements to unbundle. The existence of platforms capable of providing services similar to wireline telecommunications service is legally irrelevant to the unbundling inquiry. Rather, the Commission's sole focus should be on *facilities* used by the incumbents to provide telecommunications services, as Congress intended to break the ILECs' bottleneck control over *those facilities*.⁹⁰ If other technologies, like cable, wireless or satellite, offer platforms to furnish services that resemble those provided by ILECs, that may result in beneficial cross-platform "intermodal" competition, but it cannot be deemed to lessen the Congressional mandate to unbundle the ILEC networks (especially in light of the fact that cable, wireless and satellite providers are not required to provide unbundled access to requesting carriers).

Thus, the D.C. Circuit's criticism of line sharing — that it was ordered without consideration of the effect of cable modems in the market⁹¹ — appears to have no rational relationship to the statute. Nothing in Section 251 or in the legislative history to the 1996 Act included a caveat that ILECs must unbundle the local network unless a carrier can somehow adapt and gain access to the technologies and facilities of an entirely different industry for use in

⁸⁹ Joint Explanatory Statement at 113.

⁹⁰ House Report at 49.

⁹¹ *USTA*, 290 F.3d at 428.

wireline telecommunications.⁹² Put plainly, there is no statutory basis for creating an intermodal exemption that affords ILECs protection from the Act's unbundling mandates. Cable, wireless and satellites predate the Act – Congress did not deem it permissible for ILECs to retain their monopoly over wireline telephony because others might someday nip at it through the use of other modes of transmission.

D. An Element Must Continue to Be Unbundled Unless Actual, Not Theoretical, Alternatives Are Available to Competitors

In keeping with the presumption for unbundling that Congress intended,⁹³ the Commission should make clear that overcoming that presumption requires proof that CLECs have actual, available, working alternatives as a practical, economic and operational matter — substitutes, in the true sense of the word⁹⁴ — to ILEC facilities. This requirement means that empty statements that a certain number of competitors exist in a given market, the type of “market evidence” that was the mainstay of the Joint BOC High-Capacity Loop Petition,⁹⁵ have no effect whatever on existing unbundling obligations.⁹⁶ For the mere presence of competitors, or even of competition, says nothing about whether a CLEC will be impaired in providing its chosen service.⁹⁷

⁹² Under the plain language of Section 251, Verizon's argument that the Commission's unbundling analysis must include consideration of cable competition “in order to remain faithful to the requirements of Section 251(d)(2) and Congress' intent” is exactly backward. Verizon Comments at 123.

⁹³ *E.g.*, House Report at 49, 89.

⁹⁴ The CLEC Coalition also agrees with the UNE-P Coalition's discussion of the “interchangeability” of elements as the proper inquiry. UNE-P Coalition Comments at 19-20.

⁹⁵ CC Docket No. 96-98, Joint Petition of BellSouth, SBC and Verizon (April 2001).

⁹⁶ As explained in the Affidavit of Mark Jenn, Manager of Federal Affairs of TDS Metrocom, the UNE Fact Report submitted by the RBOCs relies primarily on how many CLECs are present in a given market, rather than how many UNE alternatives are available in that market, with the result that the potential market for wholesale elements is perceived as larger than actual facility numbers denote. Affidavit of Mark A. Jenn, ¶¶ 8-23 (July 16, 2002) (“Jenn Aff.”).

⁹⁷ 47 U.S.C. § 251(d)(2). For example, as Mike Duke of KMC has explained, competitors often do not build out networks with excess capacity such that they can serve third-party needs as well as their own. Duke Aff., ¶ 12-14 (KMC).

The presence of competition garners *theoretical* alternatives. Yet CLECs cannot reasonably be expected to find usable substitutes for ILEC network elements simply because another CLEC is there. As the Commission learned through the comments filed on the Joint BOC Loop Petition, often the presence of other carriers provides little help to a CLEC in obtaining critical local facilities. First, it has not been found by any member of the CLEC Coalition that any third party, whether CLEC or vendor, has a network of sufficient density and ubiquity to provide actual alternatives to UNEs on more than an isolated basis (and even then, the alternative provider often relies on ILEC UNEs or ILEC special access for their underlying facilities).⁹⁸ Secondly, often the facilities are not deployed along the same route that another carrier needs. Third, the facilities may be fully in use and thus not available to any third party.⁹⁹ Fourth, even where excess capacity may exist, few CLECs are equipped with the systems necessary to act as a wholesale vendor.¹⁰⁰ Finally, in some instances in which a third party has available capacity and is willing to lease it, “the operational interfaces” make using those facilities too problematic “to be a viable facility source.”¹⁰¹ Under these common scenarios, CLECs have no access to actual alternatives, they simply have theoretical vendors.

Section 251 ensures that CLECs do not have to rely on theoretical element vendors, however. Rather, the incumbent network, controlled by the ILECs and deemed ripe for

⁹⁸ Duke Aff., ¶ 11 (KMC) (“KMC has still not found any third party that can provide it with alternatives to ILEC loops to fit its proposed service plan.”); Cadieux Aff., ¶ 8 (NuVox) (“[G]enerally NuVox is not aware of third-party providers actively offering HiCap loop facilities on an unbundled, wholesale, basis.”). *See also* CC Docket No. 96-98, CLEC Coalition Joint Comments at 22-23 (June 11, 2001) (opposing the Joint Petition of SBC, BellSouth and Verizon for relief from loop unbundling rules) (“CLEC Coalition High-Cap Loop Comments”). For example, Cbeyond has explained to the Commission that “as a practical matter, Cbeyond does not have any alternative to BellSouth for high-capacity loops.” *Id.* at 23.

⁹⁹ CLEC Coalition Joint Comments at 30.

¹⁰⁰ Duke Aff., ¶ 1 (KMC) (“Nor does KMC have the necessary back office systems to support a wholesale transport offering to other CLECs.”).

¹⁰¹ Cadieux Aff., ¶ 9 (NuVox) (discussing DS1 and DS3 transport specifically).

unbundling by Congress, must be the primary resort for CLEC entry. If not these facilities, then some tangible, actual UNE substitutes capable of supporting a CLEC's chosen service must be demonstrated to be available. These substitutes must reasonably approximate the efficiency, price, ubiquity and quality of ILEC facilities.¹⁰² Absent such finding, Congress' intent to diminish ILEC "bottleneck control" over the network and share the benefits of those facilities in furtherance of competition will have been ignored.

E. The Commission Should Adopt an Unbundling Framework That Places the Burden of Proof for Eliminating a UNE on the ILECs

As discussed above in Section II.B, the new legal landscape created by the *USTA* decision seemingly requires that the Commission rely more heavily on State Commissions to perform the more granular analysis that the D.C. Circuit appears to favor. As further discussed in that section, this reliance should be tempered with clear federal guidelines on the meaning of the impair standard, to which the states will apply their specific set of local conditions. In order to ensure the proper implementation of this TELRIC-type arrangement (with 271-like benchmark protection), the Commission's unbundling framework should include a specific review procedure that states will follow in performing the requisite granular unbundling analysis. In order best to ensure that states have the benefit of a full and sufficiently detailed record, that procedure should be premised on a burden-shifting mechanism whereby ILECs must first attempt to show that a UNE fails to meet the impair test on particular routes (for transmission UNEs) or in particular offices or markets (for other UNEs), and if that attempt is deemed credible by the State Commission, CLECs will then be permitted to demonstrate that actual alternatives for that UNE

¹⁰² See *UNE Remand Order*, 15 FCC Rcd. at 3734-44, ¶¶ 72-99. This five-factor analysis was not specifically addressed by the Court of Appeals in *USTA* and could well remain the appropriate review criteria, given the adoption of a toothier impairment threshold that seems required. See 290 F.3d at 423, 428.

do not exist in that office or market or, even more precisely, along a specific route or path when transmission UNEs are at issue.¹⁰³

As the CLEC Coalition explained in its Initial Comments, the party requesting that an element be removed from the UNE list bears the burden of proof that CLECs will not be impaired if such access were denied.¹⁰⁴ Because, as has been demonstrated,¹⁰⁵ Congress intends that incumbents cede some of their monopoly advantage by opening their networks on a cost-based and nondiscriminatory basis,¹⁰⁶ the Commission must premise its guidelines on the understanding that a presumption in favor of unbundling is required; should a carrier be able to prove that further unbundling is not necessary to prevent impairment of CLECs' ability to provide the range of services they seek to offer, then the presumption will have been overcome. Until that time, however, the existing UNEs must remain available at cost-based rates.

In accordance with this presumptive standard, then, the Commission should adopt a burden-shifting review mechanism for State Commissions to employ in their primary unbundling review. This mechanism would first require the ILEC to make a *prima facie* showing of no CLEC impairment and, if that showing is made, would permit CLECs to demonstrate that there remain unserved or underserved routes or portions of the particular office or market at issue, such that the element at issue must remain unbundled there. This mechanism must incorporate the fact that ILECs must overcome the presumption of unbundling; absent the petitioning

¹⁰³ For some UNEs, notably loops, any analysis more granular than a CO-by-CO inquiry admittedly would be difficult to perform. However, a showing that a particular CO has only partial competitive loop alternatives would be insufficient to retire the loop unbundling requirement within an entire CO.

¹⁰⁴ CLEC Coalition Comments at 112-113.

¹⁰⁵ See Section I.A., *supra*.

¹⁰⁶ *E.g.*, House Report at 49, 89.

carrier's ability to rebut the unbundling presumptions, CLECs will have no cause or obligation to make a countering demonstration.

This procedural construct will have a normative effect on State Commission review that shapes the logic but not the substance of their required granular unbundling analysis. It sets baseline policy, that being the unbundling presumption, and prescribes a method of application that borrows from the existing TELRIC pricing scheme. Premised on conformity with Congress' core unbundling mandates, it comports with the Supreme Court's rationale in *Verizon*. Because it empowers the states to perform focused, fact-based competitive inquiries, it implements the Court of Appeals' *USTA* mandate. By placing the burden of proof on ILECs in this way, the Commission will have satisfied its obligations to implement Section 251 mandates.

The proposed mechanism also reflects the (disappointingly limited but) positive role Section 271 reviews have had in applying benchmarks to ameliorate the effect of bad state decisions on TELRIC.¹⁰⁷ Under the state-federal review construct that the CLEC Coalition has proposed in Section II.B., the Commission's review of any state recommendation to de-list an existing UNE must first find that the State Commission properly applied the burden of proof. If it is evident that the State Commission began from the basis that CLECs must make a showing of need for a UNE rather than the ILEC demonstrating the existence of actual alternatives for a UNE, it will have tilted the analysis in a manner that contravenes Congress' reliance on unbundling to share the benefits of the ILECs' networks. As such, the Commission would be bound to reject the state's recommendation outright. If, however, the state properly applied the burden of proof, the Commission would then review the state's analysis and fact finding to ensure that, as a practical economic, and operational matter, actual, usable UNE alternatives are

¹⁰⁷ To ensure compliance with the Section 251 statutory standard, CLEC Coalition members propose a more exacting and rigorous review than is evident in the Commission's Section 271 decisions.

available to CLECs and that the reduced unbundling obligation is sufficiently tailored so as not to foreclose new entry. This exercise of Commission oversight is necessary to ensure that State Commissions make determinations that comport with Congress' core procompetitive goals of the 1996 Act.

F. The Commission Should Not Adopt Proxies or "Triggers" In Place of Fact-Based Impairment Analysis

As the CLEC Coalition demonstrated in their Initial Comments,¹⁰⁸ the 1996 Act does not support the adoption of proxies or "triggers," such as automatic sunsets or CLEC head counts, as tools for determining whether a network element should be unbundled.¹⁰⁹ Triggers are the antithesis of analysis, and as such fail to meet either Congress' or the D.C. Circuit's requirements for Commission review.

Section 251 requires that the main determinant of whether to unbundle an element remains the CLEC and whether its ability "to provide the services that it seeks to offer" is impaired.¹¹⁰ This inquiry is not answered by the number of companies that are present or are doing business in a given market.¹¹¹ Rather, the focus is on the CLEC's impairment and, further, whether the CLEC may turn to UNE alternatives in a manner that approaches the efficiency, price, ubiquity or quality of the network to which the ILEC has such easy access.¹¹² Or, as the Commission has stated, whether the CLEC "can realistically be expected to actually provide

¹⁰⁸ CLEC Coalition Comments at 64-66. *See also* California Public Utility Commission Comments at 15; Ohio Public Utility Commission Comments at 10-11; ZTel Comments at 56-57.

¹⁰⁹ *See NPRM*, ¶ 45.

¹¹⁰ 47 U.S.C. § 251(d)(2)(A).

¹¹¹ As Mark Jenn explains, triggers such as the presence of two or more fiber-based collocated CLECs or \$150,000 in special access revenue in an area "have no direct relationship to the level of competition in an exchange." Jenn Aff., ¶ 20 (TDS Metrocom). These triggers were proposed by SBC. SBC Comments at 91-93. BellSouth has suggested other triggers, which are equally flawed, such as lifting unbundling requirements where 15% of wire centers have one or more collocated CLEC. BellSouth Comments at 35.

¹¹² *See UNE Remand Order*, 15 FCC Rcd. at 3734-44, ¶¶ 72-99.

service” with non-ILEC-owned network elements.¹¹³ Although the presence of competitors may lead to evidence that a CLEC may not be impaired with respect to certain network elements, in and of itself, it says nothing. Or as the oft-misquoted adage goes, “statistics don’t lie — they don’t say anything.”

It is impossible for any commission to find that a CLEC could enter the market on a reasonably equal basis with ILECs based on trigger “evidence.” For example, to recite that three CLECs have facilities in a market¹¹⁴ does not explain whether (1) the facilities are available to third parties, (2) the facilities lie along any other carrier’s required route or serve the carrier’s desired geographic area, (3) whether the facilities the CLEC uses provide the functionality sought by another CLEC for the services it seeks to provide, (4) whether those facilities can be incorporated into another CLEC’s network without posing undue operational problems,¹¹⁵ or (5) whether those facilities are available at prices that approximate TELRIC.

Notably, a single or even a small number of actual, available alternatives is not necessarily sufficient to find CLECs will not be impaired by removal of a UNE. There needs to a sufficient number of actual alternatives so that a carrier reasonably can expect competitive market pricing to reign after removal of the UNE and the ILEC’s associated obligation to unbundle at TELRIC prices. Unless there are a sufficient number of competitors on a route for a particular facility, there will be a high likelihood of umbrella pricing. With too few alternative

¹¹³ *Id.*, 15 FCC Rcd. at 3730, ¶ 62.

¹¹⁴ Joint BOC Petition at 20 (stating that 77 of the top 100 MSAs contain three or more competitive fiber “networks”).

¹¹⁵ *UNE Remand Order*, 15 FCC Rcd. at 3738, ¶ 84. The D.C. Circuit did not address, and thus did not criticize, the Commission’s use of an operational impact criterion in its unbundling analysis. *See USTA*, 290 F.3d at 422-426 (discussing Commission’s desire to set national UNEs), 426-428 (discussing Commission’s analysis of cost disparities between self-provisioning and leasing UNEs).

offerings, it is likely that third party providers and the ILEC will raise and maintain excessive rates once the ILEC is relieved of its TELRIC obligation.

Similarly, and what is even more flawed than triggers, would be to set a firm deadline for unbundling that excludes consideration of all other factors fails Section 251 requirements. As the Supreme Court admonished the Commission in *Iowa Utilities*, it cannot “blind itself” to the state of competition and the local network.¹¹⁶ Reliance on temporal sunsets effectively puts blinders on a commission, preventing it from seeing the competitive realities that CLECs face. As such, they should not be adopted as the final, or even the initial, inquiry as to whether a network element meets the impairment standard.

IV. APPLICATION OF THE COMMISSION’S IMPAIRMENT STANDARD MUST BEGIN WITH THE EXISTING SET OF UNEs

The crucial import that Congress assigned to local network unbundling¹¹⁷ requires that the forthcoming review begin with the existing set of UNEs. The D.C. Circuit left the UNE rules intact,¹¹⁸ making this approach appropriate, especially in light of the Supreme Court’s decision in *Verizon*. Moreover, the presumption for unbundling that pervades Section 251 must remain a foremost concern in this review, and can be properly respected only by taking this type of “top-down” approach by assuming the need for all UNEs unless empirical data demonstrate otherwise.

Applying the standard articulated in Section III above – or any other reasonable interpretation of the statutory test – should make clear that the existing list of UNEs continues to meet Congress’ “impair” standard in all markets served by Coalition members. As the CLEC

¹¹⁶ *Iowa Utils. Bd.*, 525 U.S. at 389-390.

¹¹⁷ House Report at 49. (“The inability of other service providers to gain access to the local telephone companies equipment inhibits competition that could otherwise develop in the local exchange market.” *See also id.* at 89 (“the purpose of this legislation is to shift monopoly markets to competition as quickly as possible”).

¹¹⁸ *USTA*, 290 F.3d at 428, 430.

Coalition has shown in its Initial Comments and affidavits, and will demonstrate here with additional affidavits, there presently are only isolated instances where there may be alternatives to the UNEs that are critical their ability to offer competitive and innovative services to their customers as a practical economic and operational matter. The data provided by the ILECs in this proceeding is insufficient to rebut this conclusion. Moreover, that data often is irrelevant, misleading and inaccurate and makes no attempt whatsoever to demonstrate that any alternatives are actually made available at competitive rates that will stay competitive once an unbundling obligation is removed.¹¹⁹ On the basis of this record, there are no supportable grounds upon which this Commission or a State Commission with jurisdiction over a market in which a Coalition member competes would be justified in removing any UNE from the list.

A. The Record Does Not Demonstrate that Practical and Actual Alternatives Exist for Unbundled Dedicated Transport

Regardless of the arguments and tallies that the ILECs have presented to the contrary, the fact remains that, with only rare exceptions, CLECs do not have actual access to other vendors or carriers for fully substitutable alternatives to ILEC dedicated transport facilities in DS1, DS3 and OCn capacities, and in all forms including dark fiber and SONET rings.¹²⁰ Moreover, there is

¹¹⁹ E.g., Jenn Aff., ¶ 12 (TDS Metrocom) (demonstrating that the UNE Fact Report overstates TDS Metrocom's presence in Chicago, Detroit, Milwaukee-Waukesha, Grand Rapids-Muskegon-Holland, Ann Arbor, Lansing/East Lansing, Kalamazoo-Battle Creek, Madison, and Appleton-Oshkosh-Neenah), ¶ 15 (noting that the UNE Fact Report figures for TDS Metrocom's loop capacity are greater by orders of magnitude than TDS' actual deployment figures).

¹²⁰ Contrary to BellSouth's persistent contention, BellSouth Comments at 56, the Commission in fact has ordered ILECs to unbundled SONET rings, as was reiterated in the *NPRM*. *NPRM*, ¶ 63 (stating that "ring architecture transport was included within the definition of unbundled transport and that incumbent LECs must provide it on an unbundled basis") (citing *UNE Remand Order*, 15 FCC Rcd. 3843, ¶ 324). Thus, BellSouth's comments serve as an admission that they do not provide unbundled access to dedicated transport as required by the Commission's rules. The CLEC Coalition urges the Commission to direct its Enforcement Bureau to take proactive steps to remedy this situation and provide redress to competitors who have not had the option of ordering SONET at TELRIC rates from BellSouth.

little or no capital available for self-provisioning at this point in time.¹²¹ From the perspective of CLEC Coalition members, impairment is most severe with respect to two types of interoffice transmission routes: transport from CLEC hubs to ILEC offices; and transport between ILEC offices.¹²² As the CLEC Coalition has shown, alternative transport vendors along these routes — to the extent that any exist — “do not provide anything approaching the geographic ubiquitous coverage” that CLECs require¹²³ let alone provide it at competitive prices.

The Commission simply cannot rely on the UNE Fact Report as evidence of the existence of non-ILEC alternatives to dedicated transport. First, the UNE Fact Report focuses on largely irrelevant data, as it makes no attempt to show the existence of dedicated transport alternatives that are actually available to CLECs as a practical, economic and operational matter. Second, with respect to what it does show (tallies), the UNE Fact Report is riddled with inaccuracies. In this case, the UNE Fact Report grossly overstates the presence of competitive transport. For example, the report provides data regarding TDS Metrocom’s deployment in 10 of its markets that is misleading, if not completely false.¹²⁴ Even if the figures presented were deemed reliable (which they simply cannot be), tallies such as the number of wire centers with a certain number of competitors provide nothing useful for the granular review contemplated by the Commission and now apparently required by the D.C. Circuit.

¹²¹ Cadieux Reply Aff., ¶ 9 (NuVox) (“As the Commission is well aware, for the last eighteen months the capital markets have been virtually shut-down for the CLEC industry.”). *See also* Jackson Aff., ¶ 7 (TDS Metrocom).

¹²² By focusing on these transport segments, CLEC Coalition members do not suggest that impairment does not exist on others. With limited resources available, the intent here is to focus on what is needed most by the particular carriers signing onto these comments.

¹²³ Cadieux Aff., ¶¶ 10-11 (NuVox). *See also* Polito Aff., ¶ 8 (SNiP LiNK); Powell Aff., ¶ 5 (e.spire).

¹²⁴ Jenn Aff., ¶ 12 (demonstrating that the UNE Fact Report overstates TDS’ presence in Chicago, Detroit, Milwaukee-Waukesha, Grand Rapids-Muskegon-Holland, Ann Arbor, Lansing/East Lansing, Kalamazoo-Battle Creek, Madison, and Appleton-Oshkosh-Neenah).

Similarly unimpressive is Qwest's suggestion, which is bare of empirical data, that the Commission should simply remove dedicated transport from the UNE list in any market where the ILEC would qualify for pricing flexibility.¹²⁵ This suggestion, which the Commission already has rejected,¹²⁶ makes absolutely no showing of actual alternatives and is thus barely even probative, let alone persuasive, of whether dedicated transport should be unbundled.

The evidence that the CLEC Coalition has provided demonstrates that its members would be severely impaired in providing service unless they have unbundled access to dedicated transport. Third parties, whether vendors or fellow CLECs, to the extent that they offer any alternatives (let alone alternatives as a practical, economic and operational matter), suffer a fundamental lack of ubiquity in their facilities that generally precludes reliance on them as ILEC substitutes.¹²⁷ As Nicholas Jackson of TDS Metrocom testified, "the only carrier with anything even close to ubiquitous coverage is the ILEC."¹²⁸ SNiP LiNK shares this problem, stating that "[w]e have not been able to obtain the ubiquitous network build-out that we require in our markets without ILEC transport."¹²⁹ Even where selected routes are served by third party providers, NuVox has found that typically only one alternate source is present and that it is not available below a DS3 level.¹³⁰

The fact that other CLECs may be present in a market does not diminish CLEC impairment with respect to dedicated transport. As Michael Duke of KMC explained, his

¹²⁵ Qwest Comments at 32.

¹²⁶ *UNE Remand Order*, 15 FCC Rcd. at 3756, ¶¶ 131-132 (discussing criteria for granting ILECs pricing flexibility but noting that "[i]t is not appropriate to use these types of triggers to determine whether alternative sources of network elements are actually available as a practical, economic, and operational matter.").

¹²⁷ Powell Aff., ¶ 5 (e.spire); Jackson Aff., ¶ 9 (TDS Metrocom); Polito Aff., ¶ 8 (SNiP LiNK).

¹²⁸ Jackson Aff., ¶ 9 (TDS Metrocom).

¹²⁹ Polito Aff., ¶ 8 (SNiP LiNK).

¹³⁰ Cadieux Aff., ¶ 10 (NuVox).

company does not have the funds to build out more transport capacity than it can reasonably forecast for its own use.¹³¹ Rather, “KMC operates its transport at a very high fill rate” and its facilities “are thus nearly at capacity.”¹³² As such, KMC “is not able to act as a third-party supplier to other CLECs.”¹³³ This type of lean, efficient and cost-justified transport deployment is also characteristic of other CLEC Coalition members such as TDS Metrocom.¹³⁴ Moreover, even if excess capacity exists, CLECs typically do not have the resources and infrastructure needed to develop wholesale products, provisioning and support.¹³⁵

Nor is obtaining these types of transport facilities from ILEC access tariffs a reasonable substitute for UNE transport.¹³⁶ Special access transport is “priced excessively”¹³⁷ such that CLECs could not rely on special access to provide sustainable competitive product offerings. Though CLECs often have resorted to using special access transport in order to serve customers, the price of that transport destroys their margin and ultimately makes their own retail prices less competitive.¹³⁸ Thus, special access does not provide a fully substitutable “competitive alternative” to ILEC UNEs.¹³⁹ Moreover, the fact that CLECs have in the past been forced to use special access transport, largely because they have been denied access to unbundled

¹³¹ Duke Aff., ¶¶ 12-14 (KMC).

¹³² *Id.*, ¶ 13.

¹³³ *Id.*, ¶ 12.

¹³⁴ Jackson Aff., ¶¶ 7-8 (TDS Metrocom). As other parties have also noted, competitors cannot build capacity and expect demand to develop. Rather, each build must be cost-justified at the outset. AT&T Comments at 42-43; WorldCom Comments at 19-20.

¹³⁵ Duke Aff., ¶ 1 (KMC).

¹³⁶ The Commission flatly rejected the notion that the availability of transport at access rates and conditions meant that unbundled transport fails the impairment standard. *UNE Remand Order*, 15 FCC Rcd. at 3674, ¶ 68.

¹³⁷ Cadieux Aff., ¶ 14 (NuVox).

¹³⁸ Powell Aff., ¶ 8 (e.spire).

¹³⁹ Qwest Comments at 34.

transport,¹⁴⁰ should not now be used as evidence that special access transport is a reasonable alternative.

Finally, self-provisioning currently is not a practical option for most new competitors, especially in light of today's excessively tight capital markets. The costs of building, retaining the necessary franchise and right-of-way agreements (to the extent they can be obtained at all),¹⁴¹ and the facilities themselves is staggering. TDS Metrocom reports that one mile of fiber costs \$150,000 to deploy.¹⁴² In addition, ongoing right-of-way fees are up to \$0.20 to \$0.30 per foot, per year – \$719 to \$1079 per mile. Young companies cannot be expected to have that kind of ratebase or funding source to support self-provisioning.¹⁴³ Incumbents, by contrast, have those luxuries. As such, their obligation to provide unbundled dedicated transport facilities must remain intact.

1. CLECs Cannot Reasonably Enter the Market or Serve Customers Without Transmission Facilities Linking Their Hubs to ILEC Offices

The Commission has required that ILEC-to-CLEC dedicated transport be unbundled since 1996.¹⁴⁴ This requirement includes routes from all ILEC premises, including end offices,

¹⁴⁰ Powell Aff., ¶ 9 (e.spire) ("Unfortunately, e.spire has encountered many obstacles in purchasing high capacity UNEs from the Bells, and as a result, is left at times with no alternative but to buy identical services at high tariffed special access rates in an effort to timely provision services and to avoid losing a customer.").

¹⁴¹ Polito Aff., ¶¶ 4-7 ("SNiP LiNK has found that obtaining rights-of-way in New Jersey, its core market at this time, is a very difficult process that is skewed in Verizon's favor.").

¹⁴² Jackson Aff., ¶ 11 (TDS Metrocom).

¹⁴³ Further, the ability of CLECs to recoup their investment through access rates and reciprocal compensation continues to be whittled away by new rules limiting the per-minute rates that they may charge, and in fact whether they may assess charges in the first instance. Jackson Aff., ¶ 12 ("[R]egulators have curtailed recovery of costs by limiting CLEC access rates and raising the specter of full bill-and-keep compensation under the misguided impression that CLEC cost structures are identical to those of giant 100-year old monopolists."). See generally *Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, FCC 00-193, 15 FCC Rcd. 12962 (2000); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Inter-carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, 16 FCC Rcd. 9151 (2001).

¹⁴⁴ *Local Competition First Report and Order*, 11 FCC Rcd. at 15718, ¶ 440.

serving wire centers, and tandem switches.¹⁴⁵ The fact that ILECs remain the best source for these facilities is clear: they have the best, and sometimes the only, access to their own offices. By virtue of having this legacy presence, they are required under Section 251 to provide competitors with the facilities that permit interconnection and access to unbundled elements. In fact, dedicated transport UNEs serve as one of the key modes of interconnection and access to UNEs (rights guaranteed to CLECs by the 1996 Act),¹⁴⁶ and it is thus difficult to conceive of when a CLEC would not be impaired without unbundled access to ILEC-to-CLEC dedicated transport.

As the CLEC Coalition explains above,¹⁴⁷ dedicated transport is not available as a practical, economic and operational matter from third parties (some route specific exceptions for the highest capacity circuits may exist). Indeed, the experience of CLEC Coalition members indicates that the presence of even one third party provider on a selected route is rare and, even then, operational and pricing issues may not make the third party product (if, in fact, there is one) a suitable alternative to ILEC dedicated transport UNE.¹⁴⁸ As is also clear from the data provided above, self-provisioning transport requires literally hundreds of thousands of dollars per route, rendering it outside the reach of new companies that have exceptionally limited access to capital no secure ratebase to fund them. Moreover, the process of obtaining rights-of-way and franchises from municipal authorities imposes extreme delay, often of several months.¹⁴⁹

¹⁴⁵ *Id.*

¹⁴⁶ The collocation requirement was created to provide the means “necessary for interconnection or access to unbundled network elements.” 47 U.S.C. § 251(c)(6).

¹⁴⁷ See also CLEC Coalition Comments at 92-94.

¹⁴⁸ Cadieux Aff., ¶¶ 10-11 (NuVox). See also Polito Aff., ¶ 8 (SNIp LiNK); Powell Aff., ¶ 5 (e.spire).

¹⁴⁹ Polito Aff., ¶ 7 (SNIp LiNK).

With respect to these hub facilities, third party- or self-provisioning is further complicated by the fact that the ILEC controls one of the end points. ILECs typically are not welcoming hosts and seem to take every opportunity to disrupt attempts by others to provide and CLECs to use alternatives to than their own special access products. Collocation requirements and the complicated and expensive regime ILECs attach to them deliberately slow the pace and increase the expense of developing non-ILEC alternative dedicated transport facilities connecting CLEC hubs and ILEC offices.

2. ILECs Remain the Only Practical Source for Transport Between Their Offices

Essentially the same analysis applies for dedicated transport facilities connecting ILEC offices. This type of transport has also been unbundled since 1996¹⁵⁰ and access to it remains concentrated in ILEC hands. Again, ILECs have the complete access and longstanding presence along their own interoffice routes that simply cannot be duplicated.¹⁵¹

Neither DS1 nor DS3-level transport, nor high capacity OCn transport, can be obtained from third parties on anything other than an isolated basis.¹⁵² To the extent a third party could install interoffice facilities, they can have extreme difficulty in obtaining the necessary rights-of-way.¹⁵³ And if these third parties can obtain the rights-of-way, they typically come at a price in both delayed time-to-market and the fees that apply, as explained above. Self-provisioning facilities between ILEC offices faces the same prohibitive costs and rights-of-way as any other

¹⁵⁰ *Local Competition First Report and Order*, 11 FCC Rcd. at 15718, ¶ 440.

¹⁵¹ Even SBC agrees that dedicated transport between ILEC wire centers or switches should be unbundled. SBC Comments at 95-96.

¹⁵² *Cadieaux Aff.*, ¶¶ 10-11 (NuVox).

¹⁵³ *See Polito Aff.*, ¶ 8 (“For the reasons explained above, transport installation is made very difficult for us by the arcane rights-of-way process in many New Jersey municipalities. Third-party vendors face these same problems.”).

form of transport.¹⁵⁴ In fact, the build-out (whether self-provisioned or by a third party) is even more difficult for these routes, because the ILEC has control not only over one end point (as in CLEC-to-ILEC routes), but both end points.

Notably, Verizon's argument that it is unnecessary for it to provide "dedicated transport connecting every central office to every other central office"¹⁵⁵ ignores the plain language of Section 251. The only question under Section 251 is whether *the requesting CLEC* would be impaired in the service it seeks to provide if it could not obtain transport between ILEC offices from the ILEC.¹⁵⁶ If the answer is yes, Verizon must provide it. Neither the Act nor the Commission's rules provided an unbundling limitation based on how Verizon would like to design its competitors' networks.

B. There is No Question that ILEC Loops Remain the Only Means of Reaching Nearly All End Users

ILEC loops are the only means of reaching the vast majority of customers. As the CLEC Coalition noted in its Initial Comments, local loops are the best evidence of the ILECs' advantage as incumbents.¹⁵⁷ In fact, loops are specifically identified by Congress as elements that must be unbundled.¹⁵⁸ Based on the absence of third party alternatives and the financial hurdles associated with self-provisioning at this point in time, there can be no reasonable argument that competitors today have any practical loop sources other than the ILECs.¹⁵⁹

¹⁵⁴ It is the height of audacity that Verizon argues that rights-of-way and franchise applications take only a few months for CLECs to obtain, Verizon Comments at 111, when Verizon enjoys blanket immunity from such requirements in the entire state of New Jersey, and likely elsewhere. *Polito Aff.*, ¶ 4 (SNiP LiNK).

¹⁵⁵ Verizon Comments at 109.

¹⁵⁶ See 47 U.S.C. § 251(d)(2).

¹⁵⁷ CLEC Coalition Comments at 73 (citing House Report at 49).

¹⁵⁸ House Conference Report at 116.

¹⁵⁹ Again, the Commission should be wary of relying on the UNE Fact Report as to whether there are actual alternatives to loops. Mark Jenn demonstrates that, as is true of their transport numbers, the RBOCs have overstated the amount of self-provisioned loops in the network. For example, the UNE Fact Report states that "that

As has been demonstrated in this case,¹⁶⁰ replicating the ILECs' ubiquitous local loop architecture is a nearly insuperable task.¹⁶¹ The expense and delay of obtaining thousands of rights-of-way, as well as the construction permits to dig up streets, is by any measure prohibitive.¹⁶² Further, these obstacles are faced by any non-ILEC,¹⁶³ thus self-provisioning¹⁶⁴ and third-party procurement remain extraordinarily difficult, if not impossible.¹⁶⁵ Even carriers like KMC, who has deployed "over 2,100 route miles of fiber" that "passes within 1200 feet of nearly 97,000 business locations," must depend on ILEC loops to serve customers.¹⁶⁶ And as TDS Metrocom has stated, "ILEC loops continue to be the only available link to the vast majority of current and prospective customers."¹⁶⁷

Though the CLEC Coalition believes that all loops, which are defined as "a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises,"¹⁶⁸ must be unbundled,¹⁶⁹ it focuses its

between 85%-95% of CLEC business lines are provided over their own facilities." Jenn Aff., ¶ 14 (TDS Metrocom). Yet TDS, which has an extensive network, is able only to provide 9% of its own loops. *Id.* The striking disparity between these figures demonstrates that the RBOCs' data is at best overly optimistic, at worst a deliberate exaggeration.

¹⁶⁰ CLEC Coalition Comments at 73-74; AT&T Comments at 123-125; WorldCom Comments at 101-102; Covad Comments at 47-49; ALTS Comments at 43-44; Sprint Comments at 18-27.

¹⁶¹ See generally *UNE Remand Order*, 15 FCC Rcd. at 3779-81, ¶¶ 183-186.

¹⁶² In order to justify the tremendous expense of a loop overbuild in any area, a CLEC would have to win and serve 70-80% of the lines in that area. Supp. Jenn Aff., ¶ 18.

¹⁶³ SNiP LiNK has demonstrated that ILECs do not incur these difficulties by virtue of their longstanding presence. Polito Aff., ¶ 6 (SNiP LiNK) ("Verizon simply does not experience these difficulties — it never has to apply [for rights-of-way or franchises] in the first instance.").

¹⁶⁴ As Sprint cogently summarizes, it is unreasonable to expect CLECs to build out 100% of the local loop architecture when they collectively serve only 10% of the local customer base. Sprint Comments at 22.

¹⁶⁵ Where, however, a CLEC is able to self-provision a loop, it must be permitted to connect the loop directly to the customer's NID. BellSouth's argument that it is a hazard to end users' homes if competitors terminate loops at the NID is preposterous. BellSouth Comments at 76

¹⁶⁶ Duke Aff., ¶ 6 (KMC).

¹⁶⁷ Jackson Aff., ¶ 10. Even BellSouth does not attempt to persuade the Commission that loops should not be unbundled. Rather, it simply admonishes the Commission that it can unbundle loops only if CLECs would be impaired without them, which is no more than the CLEC Coalition asks. BellSouth Comments at 71-72.

¹⁶⁸ *Local Competition First Report and Order*, 11 FCC Rcd. at 14691, ¶ 380.

comments on three types of loops: T1s, xDSL-capable loops, and what the CLEC Coalition has called a “loop with mid-loop electronics,” or a loop that is served via remote terminals.¹⁷⁰ These facilities are crucial for providing innovative broadband services to customers and as such comport with both Congress’ and the Commission’s policy objectives.¹⁷¹

1. ILEC T1 Facilities Are Crucial to Providing Advanced Services.

CLECs use T1 facilities¹⁷² to provide innovative bundled service offerings efficiently to small- and medium-sized business customers. Because they are ideal for provisioning integrated services, T1s enable CLECs to create a one-stop-shopping experience for consumers and thus maximize network efficiency.¹⁷³ In addition, in supporting multiple services they are cost-effective and can be used to provide competitive choice to smaller customers. NuVox reports that leasing ILEC T1s allows it to bring services “down-market,” to customers that “frequently have few, if any, alternatives for high speed Internet access.”¹⁷⁴ Thus, continuing to make T1s available on an unbundled basis enables the provision of innovative services to a greater segment of customers, exactly in keeping with Congress’ and the Commission’s goals.¹⁷⁵

¹⁶⁹ The CLEC Coalition reiterates its conclusion that the NID must remain a necessary element that is “extremely difficult to obtain or install through alternative means” and should be unbundled. CLEC Coalition Comments at 83-84. Moreover, carriers must also continue to be able to order loop UNEs with or without NIDs.

¹⁷⁰ This is not to suggest that other types of loops need not be unbundled. Indeed, it is beyond question (and imperative to TDS Metrocom’s residential service offerings) that 2-wire and 4-wire voice grade loops must remain UNEs, as the record demonstrates that these facilities are the basis for residential voice service and are available only from incumbents. For example, as of June 2001 – more than five years since passage of the 1996 Act – CLEC self-provisioned loops comprise only 3.0% or less of all switched lines in the United States. Common Carrier Bureau Industry Analysis Division, *Local Telephone Competition: Status as of June 30, 2001* at 1 (February 2002) (“*Local Competition Report*”).

¹⁷¹ House Report at 1; *NRPM*, ¶¶ 4, 23.

¹⁷² The CLEC Coalition uses the term T1 as inclusive of both T1 and DS1 loops.

¹⁷³ Cadieux Reply Aff., ¶ 6 (NuVox).

¹⁷⁴ *Id.*, ¶ 6 (NuVox).

¹⁷⁵ Joint Explanatory Statement at 113; *NRPM*, ¶ 22, 26

This practice of leasing T1 UNEs for providing integrated services debunks an all-common misconception that unbundling encourages CLECs not to invest in facilities.¹⁷⁶ In order to provide its “broadband bundle” over T1 UNEs, NuVox has had to purchase enough switches (30 ATM switches and 14 Class-5 digital switches) to handle demand in the 30 markets it serves.¹⁷⁷ Moreover, NuVox has also purchased thousands of integrated access devices (*i.e.*, specialized customer premises equipment) which permit bundled provision of voice and dedicated high speed internet access services over T1 channels.¹⁷⁸ Presumably, other carriers providing innovative T1-based services have also invested in their own facilities. Were these carriers precluded from leasing T1s on an unbundled basis, the telecommunications sector would likely never have seen this investment..

In addition, the use of T1s to provide innovative bundled services may never occurred unless NuVox, TDS Metrocom and others had implemented this type of offering. It has been demonstrated that CLEC provisioning of integrated voice and data services over T1s prompted ILECs such as Verizon and SBC to respond competitively by beginning to sell their own bundled service offerings.¹⁷⁹ These ILECs could have, but chose not to, innovate in this way until they were challenged by competitors to do so. This phenomenon is yet another instance in which CLEC ingenuity has enhanced end user service and required ILECs to catch up.¹⁸⁰ Critically, it

¹⁷⁶ *E.g.*, USTA Comments at 27 (“Mandatory unbundling is a disincentive to investment and facilities-based competition.”).

¹⁷⁷ Cadieux Reply Aff., ¶ 4 (NuVox).

¹⁷⁸ *Id.*

¹⁷⁹ Cadieux Aff., ¶ 16 (citing the Yankee Group March 12, 2002 report, appended to his affidavit).

¹⁸⁰ Ameritech’s DSL deployment has literally followed CLEC deployment in Illinois, as TDS Metrocom stated in the CLEC Coalition Comments at page 40 (citing Jackson Aff., ¶ 15 (TDS Metrocom) (“the ILEC did not begin to provision DSL until after TDS Metrocom had shown success in the market[.]”).

occurred only because federal and state law requires ILECs to unbundle loops. This positive result should not be disturbed.¹⁸¹

Contrary to what the UNE Fact Report attempts to show, T1s are crucial loops that are needed by carriers like NuVox and TDS Metrocom to reach customers. Mark Jenn demonstrates in his Affidavit that the ILECs have created a misleading picture of how many CLECs depend on T1s (or DS1s) by “inappropriately compar[ing] the number of DS1 UNE loops relative to all unbundled loop orders.”¹⁸² That is, although DS1s may comprise only 2% of orders, they actually represent 36% of access lines provided over unbundled loops.¹⁸³ Further, the ILECs data regarding high capacity loop alternatives, which again focuses on the presence of collocated CLECs rather than on the amount of suitable loop alternatives “has no relationship whatsoever to the ability to access” T1 or DS1 facilities.”¹⁸⁴

2. There Are No Actual Alternatives to Unbundled xDSL-Capable Loops.

Broadband deployment is dependent on the availability of suitable local loops, and xDSL-capable loops are a large component of that group. DSL service has proved a widely accessible advanced service for residential and small-business consumers in the short term, and is largely responsible for ushering in the first phase of broadband deployment for American consumers. This achievement was made possible by clear unbundling rules that require ILECs to provide copper loops to competitors as UNEs. Absent those rules, DSL service may never

¹⁸¹ SBC’s bare request that the Commission remove all high-capacity loops from the UNE list includes no empirical support and does not warrant serious consideration. *See* SBC Comments at 100-101.

¹⁸² Supp. Jenn Aff., ¶ 16 (TDS).

¹⁸³ *Id.*

¹⁸⁴ Supp. Jenn Aff., ¶ 21.

have been introduced, as it has been recognized that ILECs would never have entered the DSL market but for their need to respond to competition from CLECs.¹⁸⁵

The Commission has required xDSL-capable loops to be unbundled since 1996.¹⁸⁶ An xDSL-capable loop is simply a copper local loop. Being simple copper loops, they are found in predominantly residential areas that ILEC fiber buildout has not reached.¹⁸⁷ In addition, these are areas where ILEC “bottleneck control”¹⁸⁸ over the network is the most evident. As such, there are no competitive alternatives for xDSL-capable loops.¹⁸⁹ Perhaps the best indicator of this point is the fact that ILECs have attained near-monopoly status in the DSL market,¹⁹⁰ driving out several well-funded early entrants such as NorthPoint and Rhythms.¹⁹¹ Nor can CLECs reasonably be expected to deploy their own xDSL-capable loops or seek non-ILEC sources, due

¹⁸⁵ The President’s Council of Economic Advisors statement in the 1999 Economic Report of the President observed that “[a]lthough DSL technology has been available since the 1980s, only recently did local telephone companies begin to offer DSL services to businesses and consumers ... [t]he incumbents’ decision finally to offer DSL service followed closely the emergence of competitive pressure from ... the entry of new direct competitors.”). See also “Bush Administration Focuses on Increasing Demand for Broadband,” *Communications Daily* at 3 (Mar. 6, 2002).

¹⁸⁶ *Local Competition First Report and Order*, 11 FCC Rcd. at 15691, ¶ 380.

¹⁸⁷ The New Networks Institute paper “How the Bells Stole America’s Digital Future” discusses several states in which ILECs failed to complete so-called “fiber-to-the-home” initiatives, including Massachusetts and New Jersey. Available at <<http://www.netaction.org>> (visited July 11, 2002).

¹⁸⁸ House Report at 49.

¹⁸⁹ Covad Comments at 36-37.

¹⁹⁰ Garry Betty, “Taking broadband to the next stage,” CBS MarketWatch, <<http://cbs.marketwatch.com/news>> visited Feb. 20, 2002 (“Although a lot of people would like to believe that cable and DSL are direct competitors, the number of markets where the two actually go head to head is relatively small. It’s more likely that a consumer has a choice of one or the other or neither. Cable is only now starting to open up its infrastructure to alternative ISPs, and the local Bell companies have virtually no remaining competition.”).

¹⁹¹ In addition, monopoly power is defined as “the power to control market prices or exclude competition.” *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). The ILECs’ ability to exclude competition indicated by the unrecovered decline of the competitive DSL industry: Rhythms, NorthPoint, Harvard.Net, Votts Networks, and others. ILEC price control in this market is shown in their unilateral, substantial increase in DSL retail rates over the last year. E.g., B. Ploskin & D. Coffield, “Top-Dollar DSL,” *INTERACTIVE WEEK*, Feb. 18, 2001 (noting \$10/month DSL rate increased introduced by Bell Companies after DSL competitors exited the market); “Phone Companies Look to Hike DSL Charges,” *Associated Press* (May 2, 2001) <<http://archive.nandotimes.com>>.

to the economic and operational barriers already discussed.¹⁹² For these reasons, xDSL-capable loops would undoubtedly meet any impairment standard that passes Section 251 muster and must remain available on an unbundled, cost-based basis.

The requirement for unbundling xDSL-capable loops must include, as it always has, the requirement that ILECs provide these loops in the condition that will properly support DSL services.¹⁹³ This requirement is what enabled competitors to provide DSL services in the first instances, and should not now be rescinded. Not only has this so-called loop “conditioning” spurred new services and furthered the spread of broadband, but it is a valid and necessary part of the ILEC unbundling obligation itself. ILECs have exclusive control over their loops. If they were not required to provision loops in xDSL-capable condition, they may never actually support DSL services. As such, CLECs simply could not provide DSL services as many of them seek to do,¹⁹⁴ which patently constitutes impairment. Finally, the ILEC argument that “conditioning” cannot be mandated because it constitutes “superior interconnection”¹⁹⁵ is not only stale, but counterfactual. Interconnection is not “superior” if it is of the type that enables a carrier — either a CLEC or an ILEC — to provide its chosen services. ILECs can and have “conditioned”

¹⁹² No ILEC has argued that alternatives exist for their xDSL-capable loops. See BellSouth Comments at 36-37 (advising the Commission to remove these loops because advanced services are “very competitive”); Qwest Comments at 41 (DSL loop unbundling “makes no sense” in light of cable modem presence); SBC Comments at 56 (criticizing all unbundling related to advanced services as “burdensome, one-sided” regulation); Verizon Comments at 63 (stating that requiring loop conditioning constitutes requiring “superior interconnection” in contravention of Section 251).

¹⁹³ *Local Competition First Report and Order*, 11 FCC Rcd. at 15685, ¶ 382.

¹⁹⁴ *E.g.*, Jackson Aff., ¶ 15 (TDS) (“TDS Metrocom was the first carrier to provide DSL to residential customers in most of its markets in Wisconsin and Illinois.”).

¹⁹⁵ Verizon Comments at 63.

loops for their own use, and to permit them to refuse to provide loops in xDSL-capable condition would be discriminatory¹⁹⁶ and would vitiate the loop unbundling rule altogether.

3. Full Loop Transmission Capability Must Be Unbundled Where Any Portion Is Served Out of Remote Terminals or Vaults

In accordance with the Commission's definition of the loop, all loop transmission facilities that are interrupted by intermediate remote terminals ("RTs") must be provisioned as one continuous loop. This facility, which the CLEC Coalition has termed a "loop with midloop electronics,"¹⁹⁷ is necessary to ensure that CLECs can reach end users affected by the "alternative network architectures," like SBC's Project Pronto, that ILECs are deploying with increased frequency and scope.¹⁹⁸

Under this architecture, ILECs "push" newer facilities closer to residential areas by shortening the length of the remaining copper portion of the loop at the premises end. In order to do this, digital loop carrier "DLC" systems are deployed in RTs at the splice point – any carrier seeking to provide DSL services to a customer must access the loop at that point. Although the Commission has ordered that ILECs permit competitors to collocate in RTs to obtain that access,¹⁹⁹ these terminals are extremely small, such that collocating within the RT is

¹⁹⁶ Section 251 requires that ILECs provide just, reasonable, and nondiscriminatory access to network elements. 47 U.S.C. § 251(c)(3).

¹⁹⁷ CLEC Coalition Comments at 72. Several other parties have demonstrated the need for this type of complete loop facility. Covad Comments at 55-59 (stating that it "had to turn away over 24,000 end users" because of inability to access fiber-fed DSL loops); MPower Comments at 6; NewSouth Comments at 19-20; Sprint Comments at 26-27; WorldCom Comments at 109-110.

¹⁹⁸ See *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 98-147, Order and Reconsideration and Second Further Notice of Proposed Rulemaking, 14 FCC Rcd. 17806, 17858-60, ¶¶ 123-128 (2000) (seeking comment on how the Commission can ensure that CLECs maintain access to subloop facilities served over "next generation" equipment).

¹⁹⁹ *Id.*, 14 FCC Rcd. at 17829, ¶ 45.

impossible.²⁰⁰ CLECs have only gained access to RTs in a handful of instances. Thus, as a matter of network configuration and evolution, the last reach of the local loop effectively cannot be reached by CLECs. Under current rules, the ILEC effectively retains sole access to every customer served out of the RT. SBC is actually “defending” its right to maintain this competitive advantage and guarantee its monopoly before the commissions of Kansas, California, Ohio and Indiana.²⁰¹

It is therefore necessary that the Commission explicitly require ILECs to provision the entire loop, including the full functionality of whatever electronics that are appended to it in the RT, on an unbundled basis.²⁰² Absent that requirement, CLECs will be foreclosed from a considerable portion of residential areas, which would have two unjustifiable consequences. First, CLECs will be driven from the residential market. Secondly, residential consumers will have been denied a choice in service providers, which directly contravenes the principal purpose of the 1996 Act.²⁰³ Only by requiring whole-loop unbundling can the Commission properly perform its duty to implement the Act.

²⁰⁰ *Id.*, 14 FCC Rcd. at 17852 (seeking comment on collocation rules designed to maximize the availability of RTs for competitors and noting that “[w]e understand, for example, that cabinets are often specifically designed to house a single manufacturer’s equipment”).

²⁰¹ SBC Comments at 63.

²⁰² CLEC Coalition Comments at 81-82; AT&T Comments at 190-192 (discussing the “unified loop element”). Even BellSouth does not dispute that the complete loop should be unbundled if served out of an RT – it makes only the self-evident argument that ILECs should not be ordered to unbundle the complete loop if they do not control it. BellSouth Comments at 75. The Commission should nonetheless be wary of this statement, as it appears that the ILECs believe that they cede control of the loop at some point after the RT.

²⁰³ House Report at 1, 49. *Local Competition First Report and Order*, 11 FCC Rcd. at 15522, ¶ 45 (Commission states that its rules are “designed to secure the full benefits of competition for consumers”).

C. The Supreme Court Decision in *Verizon* Empowers the Commission to Require Unrestricted Access to EELs

After six treacherous years of litigation, the Supreme Court has affirmed²⁰⁴ what the Commission found in 1996: Section 251 requires ILECs to provide elements in combined form where technically feasible and where failure to do so would impair CLEC service or would discriminate against them.²⁰⁵ Having irrefutable authority to order ILECs to provide UNE combinations, the Commission should act now to ensure the unrestricted availability of EELs and reject new ILEC attempts to expand application of the use restrictions previously imposed on special access to EEL conversions. As set forth in the *UNE Remand* decision²⁰⁶ and in the initial comments of the CLEC Coalition and others,²⁰⁷ EELs provide functionality critical to expanding the reach of competitive networks efficiently (by avoiding the need for wasteful deployment of collocated transmission equipment) and reduce reliance on collocation in ILEC end offices. Further, through their use of integrated T1s, CLEC Coalition members have used EELs as a critical means of delivering broadband to consumers whose needs have been long ignored by the ILECs.

²⁰⁴ *Verizon*, 122 S. Ct. at 1687.

²⁰⁵ 47 C.F.R. § 51.315. *See also Verizon*, 122 S. Ct. at 1685 (summarizing FCC position).

²⁰⁶ The Commission has found repeatedly that collocation imposes significant costs and delays on competitive carriers. *UNE Remand Order*, 15 FCC Rcd. at 3737, ¶ 80 (“If the competitor must collocate its own switches in multiple central offices throughout the MSA ... the costs associated with collocation may impair the competitor’s ability to provide the services it seeks to offer[.]”); *id.* at 3818, ¶ 269 (“We are troubled by anecdotal evidence that collocation imposes a delay of six, nine or twelve months of the provision of ubiquitous service.”); *id.* at 3819, ¶ 270 (stating that “collocation, examined from the time a requesting carrier initiates the collocation process until a collocation arrangement is delivered, generally imposes a delay of approximately six months on the provision of service.”).

²⁰⁷ CLEC Coalition Comments at 49-52.

As set forth in the Coalition's Initial Comments, the Commission can define the EEL as UNE itself or it can continue to require access through its combinations rules.²⁰⁸ Like the loop, the EEL actually comprises several individual network element components necessary to provide connectivity between CLEC collocations or switching equipment and end user customers. Consistent with the Commission's historical approach to defining network elements, this functionality reasonably can be defined as a separate network element.²⁰⁹

This approach actually would reflect more accurately the manner in which CLECs assemble their networks and reach consumers. For example, a CLEC seeking to serve an end user subtending an ILEC end office in which the CLEC is not collocated requires a complete circuit comprised of both transport and loop transmission elements. The availability of non-ILEC alternatives for either component would not address carriers' impairment, as the entire circuit is needed to serve the customer.²¹⁰ This point is underscored by the fact that CLECs almost certainly have no means to connect a non-ILEC component with an ILEC UNE in an end office where it is not collocated.²¹¹ Although the ILECs tout the availability of third party

²⁰⁸ *Id.* at 50 (urging the Commission to lift all use restrictions as inconsistent with Section 251), at 101 (stating that "the Commission should act now to add an extended link UNE to its national minimum unbundling requirements").

²⁰⁹ *Local Competition First Report and Order*, 11 FCC Rcd. at 15631, ¶ 258 ("We adopt the concept of unbundled elements as physical facilities of the network, together with the features, functions, and capabilities associated with those features."), at 15634, ¶ 265 ("We interpreted [Section 251(c)(3)] to mean that incumbent LECs must provide carriers with the functionality of a particular element[.]"). *See also UNE Remand Order*, 15 FCC Rcd. at 3772, ¶ 167 (stating that incumbents must provide loops in xDSL-capable condition where requested "[i]n order to secure access to the loop's full functions and capabilities"), at 3782, ¶ 188 (stating that "alternative loop technologies do not offer the same functionality as wireline service"), at 3802, ¶ 235 (unbundling the "functionality of the NID" for a subloop leased by a CLEC).

²¹⁰ With added reach, CLECs may and should be able to aggregate the loop portion of circuits onto higher capacity dedicated transport via multiplexing (currently a component of the transport UNE). *UNE Remand Order*, 15 FCC Rcd. at 3842, ¶ 323.

²¹¹ As the CLEC Coalition has explained, carriers such as MFN have been able in only a few cases to obtain the types of cross-connections within ILEC offices that permit other carriers to access competitive fiber. CLEC Coalition Comments at 94-95. *See also* Affidavit of Robert Riordan, Metromedia Fiber Network Service, ¶¶ 7-12 (Apr. 5, 2002). These arrangements were hard-won and are not permitted to an extent that truly permits CLECs to use non-ILEC transport alternatives.

alternatives, they make access to them perilous and often impossible. For example, BellSouth recently announced a policy where it prohibits the connection of its UNEs to the “tariffed service” of another provider. This is simply one example of a Bell company running amuck with the use restrictions placed on special access to EEL conversions (BellSouth also seeks to rely on the use restrictions on stand-alone UNEs and as a means of supporting its unlawful practice of applying non-cost-based tariffed special access charges to interconnection trunks and facilities) and reason enough why they should be retired immediately.

In lieu of defining the EEL as an integrated UNE, the Commission should ensure unrestricted access to new EELs and remove the temporary use restrictions on circuits converted from special access to UNEs. As is the case with its loop and transport components, CLECs are impaired without access to these network elements in combination.²¹² Without EELs, CLECs have no means of serving end users that do not subtend an end office in which the CLEC is collocated or are not otherwise reached by self-provisioned network elements.

Critically, the Supreme Court’s affirmation of the Commission’s “new” combination rules does not somehow trigger, as Verizon contends, the use restrictions adopted by the Commission in the context of conversions of special access circuits to EELs pursuant to Rule 315(b).²¹³ Rules 315(c)-(f) were adopted in 1996 with no use restrictions attached.²¹⁴ In the *UNE Remand Order*, the Commission expressly declined to address new UNE combinations, outside of the context of requiring new EELs as a component of the circuit switching

²¹² As the CLEC Coalition has stated “there is no competitive wholesale market from which CLECs can obtain access to sufficient substitutes for EEL functionality.” CLEC Coalition Comments at 100. In addition, “[b]ecause CLECs cannot in the near term hope to approximate the ubiquity of ILEC loop plant, central offices and transport facilities, CLECs are materially disadvantaged in terms of cost, scope of availability, and time-to-market without unbundled access to EELs.” Nothing has changed in the last three months that would make third parties or self-provisioning any more plausible EEL alternatives today.

²¹³ Verizon Ex Parte Letter, CC Docket Nos. 01-338, 96-98, 98-147 (June 11, 2002).

²¹⁴ *Local Competition First Report and Order*, 11 FCC Rcd. at 15647, ¶ 293.

exemption.²¹⁵ Accordingly, in its *Supplemental Order* and *Supplemental Order Clarification*, the Commission did not address generically the imposition of use restrictions on combinations. Instead, these orders and the use restrictions adopted therein addressed and apply to only combinations made available as a result of Rule 315(b) (*i.e.*, network element combinations initially provisioned as special access that the Commission found subject to conversion as a result of the Supreme Court's earlier restoration of Rule 315(b)) and not the Commission's other combinations rules.

Thus, the use restrictions currently applicable to EELs converted from special access do not apply – nor were they ever intended to apply – to new EELs, as the Commission addressed solely the direct substitution (*i.e.*, replacement) of existing special access to UNE combinations that it determined was required as a result of Rule 315(b) and the corresponding impact such conversions supposedly would have on existing ILEC revenues.²¹⁶ When new EEL orders are placed, they do not constitute a substitute or replacement for special access nor do they result in a direct loss of special access rents by the ILECs.

To be sure, when the Commission made its determination in the *UNE Remand Order* that the availability of new EEL combinations would be a component of the circuit switching exemption, the Commission made no reference to any use restrictions.²¹⁷ Similarly, no reference to new EELs required as a condition of the circuit switching exemption was made in either of the *Supplemental Orders* in which the Commission took action to preserve ILEC special access

²¹⁵ *UNE Remand Order*, 15 FCC Rcd. at 3909, ¶¶ 478-79, 481 (declining to reinstate the combination rules), at 3808, ¶ 253 (conditioning the exemption from providing switching in zone 1 of the top 50 MSAs if the ILEC provides “nondiscriminatory, cost-based access” to EELs).

²¹⁶ Notably, the ILECs could not have claimed a “revenue hit” on new circuits.

²¹⁷ See *UNE Remand Order*, 15 FCC Rcd. at 3808, ¶ 253.

revenues (at the expense of competitors and consumers and contrary to the underlying goals of the Act (preservation of Bell monopoly rents not being one of them)).

In any event and as set forth in the CLEC Coalition's Initial Comments, the Commission's authority to impose such restrictions, even if only on a "temporary" basis, is highly suspect (if it exists at all).²¹⁸ Moreover, it is high time that the Commission lift the use restrictions, as their impact has been far broader than the Commission's stated purposes for imposing them and the ILECs have misused them to block access to EELs and stymie their competitors.²¹⁹ In addition to preventing IXC's from converting large amounts of special access to EELs for the predominant purpose of providing interexchange service, the use restrictions have prevented CLECs from providing bundled voice and broadband services, as well as dedicated high-speed data products to a broader market. The restrictions also have kept competitors' costs high, as they have prevented CLECs from grooming their networks to serve customers in the most efficient manner and have kept scores of potential new customers out of reach.

If, for any reason, the Commission deems it necessary to retain any restrictions on the conversion of circuits from special access to UNEs, the "temporary" restrictions currently in place cannot stand. As noted above, they are too broad and cumbersome to serve their intended purpose of preserving existing ILEC special access revenues by preventing IXC's from

²¹⁸ CLEC Coalition Comments at 49-50 (noting that the Commission's temporal justification for protecting Universal Service through imposing use restrictions is not supported by the Act, as "Section 254 of the Act is quite clear that implicit universal subsidies were to be eliminated as soon as practicable.").

²¹⁹ As part of a multi-pronged coordinated attack on its competitors, BellSouth even has taken to harassing its competitors with frivolous EEL audit requests that simply do not comply with the constraints imposed on such audits by the Commission. *E.g.*, NuVox Inc. Petition for Declaratory Ruling, CC Docket 96-98 (May 17, 2002).

converting special access to EELs²²⁰ (they never have had anything to do with universal service).²²¹ Indeed, the temporary use restrictions have had unintended consequences that have hobbled competitors and lined the pockets of the Bells at the expense of CLECs and consumers alike.²²² The inclusion of a voice restriction has dampened the expansion of CLEC broadband data offerings. The prohibition on commingling has been twisted (with a stunning affirmation by the FCC) to deny CLECs economies of scale enjoyed by the ILECs and to engender inefficient and expensive network provisioning.²²³ The limited audit right conveyed with the restrictions also has been (mis)used to deny conversions and to harass CLECs with audit requests that do not comport with the Commission's limited grant and otherwise appear to be intended largely to drain competitors' resources. Moreover, the "safe harbors" are too cumbersome as the formulas contained therein amount to a mad science that challenges network engineers, marketing personnel and provisioners – and leaves far too much opportunity for creative interpretation by the ILECs. The Commission also must be mindful that all of this (*i.e.*, preserving ILEC special

²²⁰ The ILECs have been fending-off combinations for six years now, and, for the past two, with the help of the Commission's temporary use restrictions on circuits converted from special access to UNEs in accordance with Rule 315(b). They have had time enough to prepare for the revenue hit associated with the cost-based access standards contained in the 1996 Act.

²²¹ CLEC Coalition Comments at 50 ("The Fifth Circuit has twice affirmed Commission action removing such subsidies. And, if there was ever a legitimate doubt, the Commission's CALLS order and subsequent MAG order affirmatively removed them."). *Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, FCC 00-193, 15 FCC Rcd. 12962, 12965 ¶ 3 (2000); *Multi-Association Group (MAG) Plan for Regulation of the Interstate Services of Non-Price Caps Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, FCC 01-304 ¶ 3 (rel. Nov. 8, 2001); *see also* NPRM, ¶ 32.

²²² The Commission has historically found use restrictions to be anticompetitive. The Commission held affirmatively in the *Local Competition First Report and Order* that legislative history to the 1996 Act "states that *Local Competition First Report and Order*, 11 FCC Rcd. 15681, ¶ 360 (stating that "section 251(c)(3) permits interexchange carriers . . . to purchase unbundled elements for the purpose of providing exchange access services to themselves in order to provide interexchange services to consumers"), if not altogether unlawful. UNE Remand Order, 15 FCC Rcd. at 3911, ¶ 484 ("the Commission found that its conclusion not to impose restrictions on the use of unbundled network elements was 'compelled by the plain language of the 1996 Act'" (citing *Local Competition First Report and Order*, 11 FCC Rcd. at 15679, ¶ 356)). *See also* *Local Competition First Report and Order*, 11 FCC Rcd. at 15679-61, ¶¶ 357-361.

²²³ *Net2000 Communications v. Verizon*, File No. EB-00-018, Memorandum Opinion and Order, FCC 01-381 ¶ 16 (rel. Jan. 9, 2002) (noting that Verizon rejected some of Net2000's DS1 orders "because, according to Verizon, they violated [the FCC's] 'co-mingling' prohibition").

access profits) negatively impacts consumers whether through restrictions, higher prices that result from the application of the use restrictions, or the inability of CLECs to extend the reach of their networks and provide a competitive choice.

Unfortunately, given the ILECs' persistent refusal or inability to provision EELs, an affirmative order to provide unbundled access to EELs – whether as UNEs or UNE combinations – is not enough to ensure that CLECs obtain them. For CLECs already locked in to interconnection agreements and special access term plans, the opportunity to order these facilities as – or convert them to – UNEs rule may effectively be foreclosed. Indeed, much of the special access ordered by CLECs today and in the past is attributable to the ILECs' success in keeping the combinations rules upended in litigation or through an outright refusal to comply with effective combination rules. UNE provisioning delays and strategic incompetence have driven and continue to drive CLECs to special access. None of these revenues should be deemed worthy of protection. Indeed, a “fresh look” policy²²⁴ is needed to correct in part the costs imposed on CLECs (and the economy in general) by the ILECs' six-year war on UNE combinations. As part of this proposal, all special access circuits (whether equivalent to standalone UNEs, EELs or some other UNE combination) should be subject to conversion without termination penalties or imposition of nonrecurring charges other than a cost-based conversion charge designed exclusively to recover administrative expenses associated with converting associated billing from special access to UNE billing. Such conversions should be deemed effective 30 days from receipt of written request for conversion. Without such explicit direction, ILECs will continue to employ and invent various means of denying CLECs access to EELs which are critical to the expansion of local competition and broadband service offerings.

²²⁴

NPRM, ¶ 80.

D. All Transmission UNEs Must be Made Available in Dark Fiber Form

As the CLEC Coalition explained in their Initial Comments, competitors have routinely been thwarted in their attempts to obtain dark fiber transmission facilities.²²⁵ The attached Declaration of Bret L. Mingo, President and CEO of CoreTel, explains the means by which ILECs – particularly Verizon – have prevented CLECs from obtaining it. As dark fiber is no different from “lit” fiber, regardless of the type of facility,²²⁶ there is neither an excuse nor a justification for ILECs attempts to shield dark fiber facilities from unbundling. In fact, the CLEC Coalition culls its discussion of dark fiber facilities out from its general UNE-specific analysis not because they are different facilities, but because they entail different challenges for CLECs attempting to lease them. Simply put, ILECs game the system for dark fiber in very special ways.

As the Commission has held, access to dark fiber is essential to competition, because the “lack of access to ubiquitous transport alternatives, which allow competitive LECs to interconnect their networks with all the central offices serving their customers, will impair these carriers’ ability to provide the services they seek to offer.”²²⁷ If CLECs are denied access to these facilities, their access to the full transmission capacity of the network is severely curtailed, thus limiting the reach and type of services that they can offer.²²⁸ As such, CLECs are impaired without access to dark fiber, which the Commission has already found.²²⁹

²²⁵ CLEC Coalition Comments at 77-80 (discussing dark fiber loops), 94-97 (discussing dark fiber transport); Riordan Aff., ¶¶ 6-15 (MFN).

²²⁶ *UNE Remand Order*, 15 FCC Rcd. at 3785, ¶ 196 (discussing fiber loops), at 3785-3786, ¶ 198 (referencing and incorporating discussion of dark fiber transport at 14 FCC Rcd. at 3843-46, ¶¶ 325-330).

²²⁷ *UNE Remand Order*, 15 FCC Rcd. at 3853, ¶ 350.

²²⁸ For example, CoreTel’s Ethernet service is impaired by its inability to obtain dark fiber facilities from Verizon. Mingo Decl., ¶ 4 (CoreTel).

²²⁹ *UNE Remand Order*, 15 FCC Rcd. at 3785, ¶ 196 (loops) 3885-86, ¶¶ 427-428 (transport).

The ILECs have created several obstacles to CLECs seeking to obtain dark fiber UNEs. First, ILECs consistently refuse to disclose to CLECs where dark fiber is in their network.²³⁰ Despite the fact that the ILEC itself deployed it, they almost universally tell CLECs that the location of dark fiber is unknown. Only Qwest presently has established databases, or rather has made these databases available to CLECs, that provide dark fiber location.²³¹ In Verizon territory, however, finding dark fiber has been likened to the game “Battleship,” whereby a CLEC must literally make “wild guesses” as to “how Verizon routes its fibers, where they have nodes and access points, where rings exist, etc.” without any information.²³² For example, the CLEC cannot know how many fibers are installed, or how many of those fibers have been reserved for Verizon’s own use and are therefore unavailable.²³³ Verizon has no procedures for obtaining such information – its “process is a black hole” – and therefore “a CLEC has no idea if there is any chance of success when ordering dark fiber.”²³⁴

Second, Verizon limits access to dark fiber to facilities at “accessible terminals,” which are points in the network that Verizon designates unilaterally.²³⁵ As CoreTel demonstrates, these “accessible terminals” represent only a portion of the places at which access to dark fiber is technically feasible – which is the sole criterion that Congress adopted for determining where carriers may access the network.²³⁶ For example, CoreTel states that access to dark fiber is possible at a “handhole,” which is “the most common type of access device” and “allows one to

²³⁰ CLEC Coalition Comments at 78.

²³¹ CLEC Coalition Comments at 79-80 (citing Riordan Aff., ¶¶ 13, 15).

²³² Mingo Decl., ¶ 6 (CoreTel).

²³³ See Mingo Decl., ¶ 8 (CoreTel).

²³⁴ *Id.*, ¶ 7 (CoreTel).

²³⁵ *Id.*, ¶¶ 11-13 (CoreTel).

²³⁶ 47 U.S.C. § 251(c)(2)(B) (carriers may interconnect to ILEC networks “at any technically feasible point”); *id.* § 251(c)(3) (carriers may access UNEs “at any technically feasible point”).

peer inside the [fiber] sheath and actually look at and work on the fiber pairs.”²³⁷ Verizon’s “accessible terminal” limitation on access prohibits CLECs from obtaining dark fiber in this way, thus significantly reducing the amount of dark fiber that CLECs may use, if not precluding that use altogether.

Third, ILECs apply their own unique definitions to dark fiber, amending those definitions to avoid provisioning it.²³⁸ For example, Verizon defines dark fiber as a facility that is in the ground and not attached to any electronics — a definition that is more restrictive than the Commission has provided.²³⁹ Under this definition, CLECs cannot obtain dark fiber “curls,” or point-to-point dark fiber that is installed but not connected to an access device.²⁴⁰ Nothing in the Commission’s rule would permit Verizon to refuse access to this fiber; unfortunately, Verizon can argue that its conduct comports with the exact language of the rule, although it flatly contravenes the rule in practice.

Finally, Verizon has imposed a requirement on CLECs that dark fiber must be provisioned as a “continuous path,” or as “a clear unbroken line of fiber between points A and B.”²⁴¹ According to what CoreTel finds to be usual engineering practices for carriers, including ILECs,²⁴² two dark fiber strands can be completed by cross-connecting two dark fiber strands with a “jumper.”²⁴³ Verizon will not permit such a configuration, however. Rather, “Verizon has taken the position that CoreTel would need to collocate at any location where they want to

²³⁷ Mingo Decl., ¶ 12 (CoreTel).

²³⁸ *Id.*, ¶¶ 13-14 (CoreTel).

²³⁹ “[D]ark fiber is fiber which has not been activated through connection to electronics that ‘light’ it and render it capable of carrying telecommunications services.” *UNE Remand Order*, 15 FCC Rcd. at 383, ¶ 325.

²⁴⁰ Mingo Decl., ¶ 14 (CoreTel).

²⁴¹ *Id.*, ¶ 18 (CoreTel).

²⁴² *Id.*, ¶ 21 (CoreTel).

²⁴³ *Id.*, ¶ 19 (CoreTel).

connect two dark fiber segments.”²⁴⁴ In other words, Verizon would rather impose on CLECs the cost and delay of collocating in several additional offices rather than permit CLECs to obtain dark fiber that is not already a “continuous path.”²⁴⁵ This requirement is patently discriminatory and has the effect of precluding CLEC access to dark fiber altogether.

In order to prevent CLECs from enduring these types of obstacles, the Commission should adopt more specific rules to govern ILEC dark fiber provisioning. First, the Commission should require ILEC to publish a list of the routes that have dark fiber installed in them, including the numbers of pairs actually available for non-ILEC use. This information will ensure that CLECs can plan their networks efficiently and obtain dark fiber in a more expeditious manner.²⁴⁶ A Commission requirement of this type shares the same policy underpinnings as its current rules requiring the nondiscriminatory provision of loop make-up information²⁴⁷ and is an equally important requirement.

Second, the Commission should adopt a definition of dark fiber that is explicitly indifferent as to whether the facility is or is not connected to electronics or an access panel of some type. The definition should include the requirement that dark fiber must be accessible at any technically feasible point, and not only at “accessible terminals” designated by incumbents.

²⁴⁴ Mingo Decl., ¶ 16.

²⁴⁵ The Commission has found repeatedly that collocation imposes significant costs and delays on competitive carriers. *UNE Remand Order*, 15 FCC Rcd. at 3737, ¶ (“If the competitor must collocate its own switches in multiple central offices throughout the MSA ... the costs associated with collocation may impair the competitor’s ability to provide the services it seeks to offer[.]”); *id.* at 3818, ¶ 269 (“We are troubled by anecdotal evidence that collocation imposes a delay of six, nine or twelve months of the provision of ubiquitous service.”); *id.* at 3819, ¶ 270 (stating that “collocation, examined from the time a requesting carrier initiates the collocation process until a collocation arrangement is delivered, generally imposes a delay of approximately six months on the provision of service.”).

²⁴⁶ See also CLEC Coalition Comments at 79-80 (urging the Commission to require ILECs to provide dark fiber loop information), 95 (regarding dark fiber transport information).

²⁴⁷ *Advanced Services MO&O*, 13 FCC Rcd. at 24037, ¶ 56; *UNE Remand Order*, 15 FCC Rcd. at 3885-86, ¶¶ 426-427.

This definition is plainly in accordance with its former descriptions of dark fiber and will prevent ILECs from unilaterally imposing definitions that are artificially restrictive.

Third, the Commission's dark fiber rule should include a presumption that CLECs need not collocate in order to access these facilities unless it is technical infeasible to do so otherwise. This rule will enable CLECs to connect dark fiber by simple cross-connections in most instances, preventing them from entering the "continuous path" scenario. More importantly, it will prevent CLECs from facing the months of waiting and thousands of dollars for collocating in needless additional offices.

It is astounding that ILECs have so blatantly refused to provide dark fiber, given that this requirement has been imposed through final Commission rules and is not a discretionary mandate.²⁴⁸ Unfortunately, it has become evident that ILECs will not comply with these rules absent more refined rule language. With the amendments that the CLEC Coalition suggests, the Commission will ensure that its existing requirement that ILECs unbundled dark fiber results in actual CLEC access to these facilities.

E. The ILECs Remain the Only Plausible Source For the Elements Required to Administer the Local Network and Deliver End User Services

Among the facilities that Congress intended for ILECs to make available are those required to administer the local network and deliver services to consumers: OSS and signaling and call-related databases. These facilities are necessary for extending the reach of the network and for completing most calls. Their importance to every local carrier, ILEC and CLEC alike, cannot be overstated. The ILECs, however, are the only carriers that have comprehensive systems and associated call-related databases. Under any reasonable impairment standard, they must continue to be unbundled.

²⁴⁸ 47 C.F.R. § 51.319(d)(1)(ii) (dark fiber transport); *id.* at 51.319(a)(1) (dark fiber loops).

1. ILEC OSS is absolutely necessary for providing service to customers and simply cannot be replicated

Operations Support Systems are “the lifeblood of network administration, management and interoperability.”²⁴⁹ They hold every piece of information about the network and support all network operations: ordering, provisioning, maintenance and repair, and billing. It is uncontested that OSS functionality is a prerequisite for providing local telecommunications service.²⁵⁰ It is also uncontested that the ILECs are the sole repository of OSS systems needed to interface with their networks and comprehensive databases.²⁵¹ Therefore, it is unquestionable that OSS must continue to be unbundled.

What must be emphasized by the Commission, however, is that the right to OSS encompasses the right to all network information it contains, in the exact form in which ILECs access it. This long-standing Commission policy requires bolstering, as ILECs continue to “gate” OSS access through filters and hidden screens.²⁵² By blocking full access to network information, ILECs can curtail the services that CLECs provide and limit the customers that CLECs can serve.²⁵³ The Commission’s mandate to implement the procompetitive provisions of the 1996 Act thus require it to ensure that its OSS rule is complied with fully in this respect.

²⁴⁹ CLEC Coalition Comments at 102.

²⁵⁰ Covad Comments at 74-76; AT&T Comments at 240. None of the ILECs attempt to state otherwise.

²⁵¹ E.g., CLEC Coalition Comments at 102-103; AT&T Comments at 240; CompTel Comments at 75; Covad Comments at 74-75; ALTS Comments at 78.

²⁵² *Advanced Services MO&O*, 13 FCC Rcd. at 24037, ¶ 56; *Local Competition First Report and Order*, 11 FCC Rcd. at 14767, ¶ 523.

²⁵³ See *UNE Remand Order*, 15 FCC Rcd. at 3886, ¶ 430 (denying loop information to CLECs “will impede the efficient deployment of advanced services”).

2. ILEC signaling and call-related databases are necessary to providing local service and no practical alternatives are available

Congress explicitly recognized that “equipment with capabilities of routing and signaling calls” remain part of the local “bottleneck” and therefore must be unbundled.²⁵⁴ Among the equipment Congress identified are signaling facilities and call-related databases. As the Commission has found, these facilities are almost inextricably linked, as the signaling functionality routes calls to the destination that is called up from the call-related databases.²⁵⁵ As such, they are used for most calls placed on the nation’s network, and every carrier must have ready access to them.

There is no practical non-ILEC alternative to the ILEC signaling network.²⁵⁶ Replicating the ubiquitous SS7 signaling network is prohibitively expensive. Yet without that ubiquity, CLECs could not achieve seamless routing of calls, which by definition impairs their ability to provide service. Unless a carrier does achieve network ubiquity, it cannot effectively provide signaling without access to the ILEC’s network at the Signal Transfer Point (“STP”), which provides key management and security functions that are not present throughout the network. Thus, CLECs remain dependent on ILEC signaling even if they are able to deploy even a limited signaling network of their own.²⁵⁷ Accordingly, signaling must continue to be provided as a UNE.

In addition, the Commission has found that ordering ILECs to provide unbundled access to their signaling networks will promote the offering of innovative services to the public, and

²⁵⁴ House Report at 49.

²⁵⁵ *UNE Remand Order*, 15 FCC Rcd. at 3879, ¶ 411.

²⁵⁶ CLEC Coalition Comments at 106-107. *See also* AT&T Comments at 238.

²⁵⁷ CLEC Coalition members continue to rely on ILEC signaling and are unaware of any carrier or vendor that has established a competitive system.

thus encourage CLECs to invest in new network technologies.²⁵⁸ Thus, rather than hinder network investment, requiring signaling networks to be unbundled spurs carriers to create and offer new services over new technologies, which both benefits consumers and makes the network more efficient. Thus, BellSouth's argument that it is somehow unfair to unbundle signaling because CLECs do not incur these "sunk costs"²⁵⁹ is wholly inapposite — first, the fact is that investment is occurring,²⁶⁰ and second, the relevant question is not whether CLECs are taking on even more sunk costs.²⁶¹

Call-related databases, which include the Line Information Database (LIDB), Toll Free Calling database, Local Number Portability database, Calling Name database (CNAM), 911 database, E911 database, and AIN databases, platform and architecture, are also practically available only from the ILECs. These databases house all telephone number information for the network to provide routing information for each call. The difficulty in replicating them is obvious, although some databases may be more easily created than others. The Commission has found in particular that the LIDB, Toll Free Calling, CNAM and Number Portability databases are so essential and so extensive that they must remain UNEs.²⁶² At this time, the CLEC Coalition is unable to distinguish among the databases as to which may be more replicable than others. Under the general presumption of unbundling that Congress has established, the Commission should leave the existing unbundling mandate intact for all databases unless ILECs

²⁵⁸ *UNE Remand Order*, 15 FCC Rcd. at 3874, ¶ 399.

²⁵⁹ BellSouth Comments at 104.

²⁶⁰ See Section I, *supra* at 5 (discussing Supreme Court finding that CLECs have invested \$55 billion in facilities since 1996).

²⁶¹ Neither Qwest nor SBC attempt to show that signaling is practically available from themselves or another ILEC.

²⁶² *UNE Remand Order*, 15 FCC Rcd. at 3880-81, ¶¶ 415-416.

can demonstrate that actual alternatives to specific call-related databases are available as a practical, economic and operational matter.

V. THE COMMISSION SHOULD ESTABLISH IMPLEMENTATION MECHANISMS TO ENSURE REGULATORY AND MARKET STABILITY

As many commenters agree, ensuring regulatory stability and finality in the competitive marketplace must remain a chief policy objective in this proceeding.²⁶³ This goal, which the Chairman himself has adopted,²⁶⁴ is particularly crucial now, as the industry is attempting to right itself after the financial upheaval of the last few years.²⁶⁵ In order not to introduce further uncertainty into this delicate period, the Commission should adopt the implementation measures proposed by the CLEC Coalition and supported by other commenters. Specifically, the Commission should impose a strict “quiet period” on the final rules to prevent carriers from repeatedly seeking their review, amendment or reconsideration for a period of three years. In addition, the Commission should prescribe an exact transitional scheme for UNE rules that require the continued unbundling of de-listed elements pending state commission approval of an alternative provisioning method and pricing that adheres to Section 202 just and reasonable requirements. These measures will provide needed assurance to end users, carriers and investors that the now tumultuous competitive telecommunications marketplace will achieve and maintain

²⁶³ CLEC Coalition Comments at 109; CompTel Comments at 107-109; AT&T Comments at 251; ALTS Comments at 123-126.

²⁶⁴ Chairman Powell has stated that “There is no greater threat to an entrepreneur, or any business than uncertainty. A key government decision that hands in suspended animation will kill the best-laid business plan. Competitors are risk takers and are incredibly agile in their ability to adapt to change, but they must know what to adapt to.” *Powell ALTS Address* at 2.

²⁶⁵ “In recent weeks, analysts have expressed concern that many providers would have difficulty recouping large capital investments in their networks.” These same analysts note that “the markets took a dive and capital dried up.” *Small Phone Companies Losing Ground to Telecom Giants*, CNet News (Oct. 5, 2000) (available at www.news.com.com/2009-1033-246610.html). Other analysts have noted that “[r]elaxing the pro-competitive interconnection requirements on the Bells in the current environment would harm the prospects for competition up and down the communication services value chain, and, thus, would discourage investment in broadband infrastructure.” Robert E. Hall and William H. Lehr, *Promoting Broadband Investing and Avoiding Monopoly* at 2 (Feb. 21, 2002).

stability for at least the short term. Absent these measures, it will be very difficult for CLECs to reverse the burgeoning misconception that telecommunications competition is an unnecessary or counterproductive policy goal.²⁶⁶

A. The Commission Should Impose a Strict Quiet Period on the Final Rules, with a Zero-Tolerance Policy on ILEC Late-Filed Reconsiderations

The Commission should maintain the existing three-year review cycle for its unbundling rules.²⁶⁷ As the CLEC Coalition has demonstrated,²⁶⁸ this cycle is the minimum length of time that could provide enough stability to the market to enable new competitive entry while comporting with the 1996 Act requirement for review of rules “every two years.”²⁶⁹ In fact, a three-year translates to only two years of actual rule finality, by operation of administrative notice and comment procedures.²⁷⁰ Because it is so valuable and yet so short, these two years of regulatory tranquility must be held sacrosanct by the Commission.²⁷¹ There can be no tolerance for the repeated ILEC attempts at reconsideration and amendment that plagued this last UNE cycle.²⁷²

²⁶⁶ Ben Heskett, “Lukewarm Response to Juniper Moves,” N.Y. Times, July 12, 2002 (“Such is the state of the telecommunications industry, in which even the largest companies are struggling to stabilize their businesses after the investment explosion of the 1990s turned into a glut of network operators and network capacity as the new millennium dawned.”); Simon Romero, “House to Question Executives of WorldCom About Influential Analyst,” July 8, 2002 (“[Mr. Grubman’s] bullish opinion of the prospects of these smaller companies contributed to the formation of expectations for the industry that resulted in an overwhelming glut of communications capacity and a string of corporate failures.”).

²⁶⁷ *NPRM*, ¶ 78.

²⁶⁸ CLEC Coalition Comments at 111.

²⁶⁹ 47 U.S.C. § 161(a).

²⁷⁰ The CLEC Coalition details the practical operation of these rules at page 111 of its Initial Comments.

²⁷¹ See NewSouth Comments at 30.

²⁷² By this statement, the CLEC Coalition does not suggest that the Commission is without the authority to clarify or strengthen its rules, or that such action would be imprudent. Rather, it simply states that repeated revisitations of the fundamental unbundling obligations themselves introduce confusion and uncertainty to the market that historically has damaged CLECs.

Commenters have amply explained in this proceeding that failure to impose strict finality on Commission rules for the short term creates unnecessary confusion in the telecommunications sector that inevitably harms competitors.²⁷³ The Commission itself has been aware since passage of the 1996 Act that lack of clarity in its rules will cause “great uncertainty for the industry, capital market, regulators and courts.”²⁷⁴ The Joint BOC Petition is of course the prime example of this phenomenon: simply by signaling to the market that the Commission’s well-crafted loop unbundling regime was under challenge, the ILECs were able to both drain CLECs of much-needed resources needed to respond to the Petition and reassure investors. Though the CLEC industry came through that trial in good stead, the exercise was entirely unnecessary.

For this reason, the Commission should establish that no attempt to amend the rules adopted here will be entertained between the close of the 30-day reconsideration period²⁷⁵ and the commencement of the next review. If the Commission receives any request for a rule change, barring extraordinary exception, it should not be given any consideration. As importantly, it should not be published or put out for notice and comment, as that mere publication will put market stability at risk. The Commission should make this rule explicit, and enforce it strictly, to avoid any ambiguity in the fact that its rules will be considered final and closed.

²⁷³ CLEC Coalition Comments at 110-111; CompTel Comments at 109; Talk America Comments at 22; ALTS Comments at 123-124.

²⁷⁴ *Local Competition First Report and Order*, 11 FCC Rcd. at 15559, ¶ 114.

²⁷⁵ Section 405 of the Communications Act of 1934 grants parties the right to seek reconsideration of a Commission order within 30 days. 47 U.S.C. § 405. The Commission “has consistently held that it is without authority to extend or waive the statutory” deadline. *In re Mobile Relay Associates*, File No. A023000, Order on Reconsideration, DA 00-0751 (rel. Apr. 6, 2000) (rejecting petitioner’s late request for reconsideration of technical requirements for a mobile relay services). In fact, federal appellate courts have overruled Commission amendment of rules on reconsideration where the underlying petition was filed after the 30-day window. *E.g., Reuters Limited v. FCC*, 781 F.2d 946, 952 (D.C. Cir. 1986).

Under the UNE review framework that the CLEC Coalition has proposed, this rule should present no hardship. As to the UNE rules themselves, extensive analysis will be performed at the state level, with ample opportunity for presentation of evidence and argument. In the unlikely event that a state recommends that removal of a UNE, Commission review would be required, affording parties still more opportunity to make their case. Whatever the ultimate outcome, allowing the final rule to remain effective and final for two years is the only sensible outcome. The likelihood that market conditions will change so quickly in that short period to warrant further review is small. Yet those two years of quiet will provide CLECs with the opportunity to implement their business plans and bring innovative services to consumers – and, as a result, spur ILECs to do the same.

In short, competition cannot take hold in a sea of changing rules. Nor can it occur without the confidence of end users and capital markets. The Commission should therefore maintain its current three-year review cycle, adding a codicil for a strict quiet period that will prevent the consideration, or even publication, of filings that seek to change or review the final rule framework.

B. The Commission Should Grandfather Any Delisted UNE, Requiring ILECs to Continue Providing All Elements Pending State Approval of Alternative Tariffs

Affirmative and specific rules should be adopted in this proceeding to ensure a smooth transition to any change in new unbundling requirements.²⁷⁶ The Commission is well aware of the negative effects that a “flash-cut” change in the rules can wreak on this industry.²⁷⁷ When network facilities and end user service are at stake, this danger becomes even more real. In the

²⁷⁶ NPRM, ¶ 79

²⁷⁷ *Id.* The Commission is particularly concerned with the “financial impact created by changes to UNE availability to all affected carriers and providers.” *Id.*

event that the Commission approves a State Commission recommendation to remove a UNE, it will be much safer and more administrable if grandfathering rules are in place to ensure that CLECs can continue to rely on that UNE until it is available through an alternative method.

The CLEC Coalition has proposed that the Commission adopt a grandfathering mechanism that includes the following protections:

- **All UNEs presently installed or on order must be provided in accordance with all applicable provisioning rules, including TELRIC cost-based rates.**

Incumbents cannot begin refusing to provision or install a UNE immediately upon a Commission order approving its removal from the unbundling list.²⁷⁸ This type of implementation would bring a CLEC's operations to a halt, severely jeopardizing end user service. Although this conduct seems unlikely, the Commission should nonetheless adopt a formal rule that prohibits it outright.

What is more likely, and almost equally dangerous, is the potential that ILECs will impose above-cost access rates to installed or ordered UNEs as soon as they are de-listed.²⁷⁹ All unbundled elements, however, must adhere to TELRIC cost-based principles, which the Supreme Court has upheld on the merits and are final.²⁸⁰ Indeed, cost-based pricing is an inherent component of the unbundling concept, as Congress recognized²⁸¹ and the Commission has ordered.²⁸² The Commission must therefore ensure that all grandfathered UNEs — UNEs already in place or on order — will remain priced at TELRIC.

²⁷⁸ See CLEC Coalition Comments at 114 & n. 387.

²⁷⁹ See *id* at 114.

²⁸⁰ *Verizon*, 122 S. Ct at 1687.

²⁸¹ “[T]he beneficiary of unbundling must pay its cost.” House Report at 71.

²⁸² *Local Competition First Report and Order*, 11 FCC Rcd. at 15816, ¶ 628 (stating that all UNEs, as well as interconnection and collocation, must be governed by cost-based pricing principles).

- **Elements that are ordered removed by the Commission must continue to be provided as UNEs until the ILEC obtains state approval for an alternative provisioning method.**

The Commission should also adopt a rule that will require the continued unbundling of de-listed UNEs in each state until the relevant State Commission has approved an alternative, tariffed provisioning method ensuring just and reasonable access to that element.²⁸³ Essentially echoing long-standing open access principles,²⁸⁴ this rule would apply general Section 201 and 202 principles to the local network and ensure its continued availability for competitors.²⁸⁵ In order for an ILEC to cease providing a de-listed UNE in any state, it must file a tariff with the State Commission detailing how that element will continue to be provided. This tariff must ensure that competitors have nondiscriminatory access to the element at prices that reflect their cost.

²⁸³ CLEC Coalition Comments at 113-116.

²⁸⁴ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III)*, Report and Order, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (*Phase I Order*), recon., 2 FCC Rcd 3035 (1987) (*Phase I Recon. Order*), further recon., 3 FCC Rcd 1135 (1988) (*Phase I Further Recon. Order*), second further recon., 4 FCC Rcd 5927 (1989) (*Phase I Second Further Recon.*), *Phase I Order and Phase I Recon. Order*, vacated, *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); Phase II, 2 FCC Rcd 3072 (1987) (*Phase II Order*), recon., 3 FCC Rcd 1150 (1988) (*Phase II Recon. Order*), further recon., 4 FCC Rcd 5927 (1989) (*Phase II Further Recon. Order*), *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), recon., 7 FCC Rcd 909 (1992), *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), recon. dismissed in part, Order, CC Docket Nos. 90-623 and 92-256, 11 FCC Rcd 12513 (1996); *BOC Safeguards Order vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), cert. denied, 115 S.Ct. 1427 (1995) (referred to collectively as the *Computer III* proceeding).

²⁸⁵ The *UNE Remand Order* recognized the need for such a rule, stating that if an element no longer meets the unbundling standards of Section 251, then "the applicable prices, terms and conditions for that element are determined in accordance with Sections 201(b) and 202(a)." *UNE Remand Order*, 15 FCC Rcd. at 3904, ¶ 470.

July 17, 2002

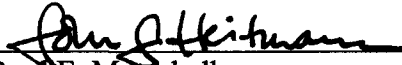
CONCLUSION

For all of the foregoing reasons, the Commission should take the following actions on remand:

- Hold explicitly that all UNEs remain in place pending review under a revised impairment standard, and that any such review must begin with the existing UNE list;
- Adopt an unbundling framework that provides federal impairment guidelines, which reflect the Supreme Court's procompetitive interpretation of the 1996 Act, to State Commissions that are best able to conduct thorough, fact-based review of local conditions;
- Establish a presumption in favor of unbundling and an impairment standard requiring specific findings of actual, fully substitutable alternatives to ILECs UNEs;
- Establish a federal oversight mechanism, similar to Section 271 review, to require Commission review of any State Commission recommendation to de-list a UNE;
- Create the transitional mechanisms of grandfathering, "fresh look," and a "zero-tolerance quiet period" to ensure regulatory and market stability.

Respectfully submitted,

**NUVOX INC., KMC TELECOM, INC., TDS
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July 17, 2002

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Section 251 Unbundling)	
Obligations of Incumbent Local Exchange	)	CC Docket No. 01-338
Carriers)	
)	
Implementation of the Local Competition)	
Provisions of the Telecommunications Act of	)	CC Docket No. 96-98
1996)	
)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability)	
)	

Affidavit of Mark A. Jenn

I, Mark A. Jenn, pursuant to 28 U.S.C. Sec. 1746 do hereby declare, under penalty of perjury, that the following is true and correct:

1. I am employed as Manager - Federal Affairs by TDS Metrocom, Inc.
2. My business address is 525 Junction Road, Madison, WI 53717-2105.
3. TDS Metrocom is a competitive local exchange carrier currently providing service in Illinois, Michigan and Wisconsin. TDS Metrocom is a wholly owned subsidiary of TDS Telecom. TDS Telecom also owns and operates over 100 rural, incumbent local exchange carriers in 28 states. TDS Telecom is itself a wholly owned subsidiary of Telephone & Data Systems, a publicly-owned holding company that trades on the American Stock Exchange under the symbol TDS.
4. TDS Metrocom provides service to both residential and business customers in mostly small to medium-sized markets with 10,000-100,000 residents. TDS

Metrocom offers customers a full range of products including local and long distance voice, dial-up Internet access, custom calling features, voice mail, DSL and other data products, among other things. TDS Metrocom serves over 180,000 lines of which nearly one half (87,000) belong to residential voice and DSL customers.

5. TDS Metrocom uses a mix of its own facilities and UNEs to provide service to end-users. TDS Metrocom owned facilities include Class 5 switches, collocation equipment, DSLAMs, fiber transport and limited direct builds to customers. TDS Metrocom leases from the incumbent UNEs such as local loops (copper, conditioned and high capacity) as well as NIDs, interoffice transport, OSS, signaling systems and call related databases.
6. The purpose of this Affidavit is two-fold. First, it will call into question the validity of portions of the RBOC "UNE Fact Report" that was filed in the initial round of comments in this proceeding by detailing very specific examples of misleading statements, self-serving assumptions and incorrect data. Second, it will show that even in geographic areas where competitors have begun to make inroads, the characteristics of each market are quite unique. Therefore, sweeping generalizations do not appropriately capture the state of the competition in these highly diverse markets and broadly crafted automatic triggers for the elimination of certain unbundling requirements such as those proposed by SBC in its initial comments are unwarranted.
7. The most glaring problems with the *RBOC UNE Report* appear in the sections devoted to interoffice transport (Section III and related Appendix K) and high

capacity local loops (Section IV). Not surprisingly, these are some of the UNEs that have come under the most serious attack from the RBOCs.

8. With respect to interoffice transport, the *Report* attempts to paint a picture of a vibrant competitive transport market with numerous wholesale opportunities. A closer look reveals that competition in this segment of the market remains generally concentrated in major urban areas and along certain routes. To start, the *Report* seems to be insinuating that the presence of a single fiber-based CLEC with collocation in a wire center shows that a competitive market for transport exists in that area. (*Report* at III-2). Such a claim is ludicrous. A single fiber-based CLEC collocation shows nothing more than that one CLEC may have had reason to justify building fiber to that central office. Perhaps the CLEC had a large enough customer with enough traffic in the wire center to justify a build. Perhaps the end office was near a CLEC's long haul network and an extension would add minimal expense.
9. TDS Metrocom's fiber network in Grand Rapids, Michigan provides a good example of how unique circumstances allowed cost-effective collocation in a specific central office. TDS Metrocom's Grand Rapids network initially consisted of just over 11 miles of fiber connecting TDS Metrocom's switch with the SBC/Ameritech tandem. Because of the location of TDS Metrocom's switch, the most straightforward route to the tandem happened to pass an additional SBC/Ameritech central office. For this reason alone, TDS Metrocom was able to justify self-provisioning fiber to its collocation in that central office. However, at least 5 other central offices or remote switching sites existed in the Grand Rapids

area which would have required nearly 60 miles of fiber to reach every site. With the cost of laying fiber nearing \$150,000 per mile, self-provisioning was not a viable option. Since there were no competitive transport providers along those routes, the only way to reach all of the central offices and provide service throughout the metropolitan area was by leasing the facilities of the ILEC.

10. Even if *arguendo* one accepts that as few as 2 or more fiber-based, collocated CLECs signals some semblance of a competitive market, the RBOCs would have interoffice transport UNEs eliminated everywhere because a mere 7% of wire centers nationally have this minimal level of competition. (*Report* at III-2, Table 1) Even in the top 25 MSAs only 19% of wire centers have more than one fiber-based, collocated CLEC. Under the RBOC plan, CLECs like TDS Metrocom would be denied access to interoffice transport in places like Green Bay, Wisconsin, Rockford, Illinois and Kalamazoo, Michigan because one in five wire centers in Chicago, New York and Washington DC have a bit of transport competition.
11. The *Report* goes on to present data on CLEC networks by MSA. (*Report* at III-7, Table 4 and Appendix K.) In general, this data suffers from some of the same deficiencies as the data presented by the RBOCs in their previous request to eliminate transport and high capacity loop UNEs. Among other things, the data includes both local and long haul fiber networks, thus over-stating the fiber networks available for local transport or fiber loops. Long haul fiber facilities focus almost exclusively on interLATA traffic and are not used for interoffice transport links within metropolitan areas. Moreover, carriers generally do not

directly build spurs off of long haul facilities to connect local service customers, nor do they allow others carriers to cut into their fiber to build direct links to customers. The data also shows more operational networks than there are CLECs in most markets. Contrary to what the RBOCs would have you believe, this data does not indicate the presence of more competition on the grounds that carriers have multiple networks in an MSA. Rather, it may actually reveal that carriers are unable to construct complete metropolitan networks and thus have only deployed certain piece parts. Two small networks divided by miles of open space may never be connected but for the ability to access the interoffice transport facilities of the ILEC. Yet the *Report* implies that such a situation shows more competition than if a CLEC were to have a single, ubiquitously deployed network in an MSA.

12. A review of the references to TDS Metrocom in Appendix K shows how misleading the data can be, if it is not completely false¹:

- Chicago, IL MSA #3: TDS Metrocom's fiber network in the Chicago MSA spans nearly 35 miles and reaches only 9 central offices which is a tiny fraction of the universe of potential locations in the MSA. Most other CLECs are likely in this same situation. The cost of deploying to all COs in the MSA is prohibitively expensive. Even if a viable wholesale fiber market were in existence, which it is not, the coordination of leasing and interconnecting with multiple carriers would be an administrative and operational nightmare, thus serving as a very effective barrier to entry. No alternative loop facilities to external customers have been built.
- Detroit, MI MSA #6: TDS Metrocom's network in the Detroit MSA is even smaller than that of Chicago, with only 15 miles of fiber from TDS Metrocom's hub switch through 3 COs to the SBC/Ameritech tandem. Again, only a tiny fraction of the Detroit MSA is covered. Furthermore, the *Report* double counts this information by also including it in the Ann Arbor MSA #90. TDS Metrocom has a single, miniscule network in Ann Arbor,

¹ The descriptions of network that appear in this Affidavit do not include any planned or proposed network upgrades, only facilities that are currently operational.

Michigan, not some widespread network throughout the Detroit area. No alternative loop facilities to external customers have been built.

- Milwaukee-Waukesha, WI MSA #40: TDS Metrocom does have a more extensive network in the Milwaukee area with 72 miles of fiber. No alternative loop facilities to external customers have been built.
- Grand Rapids-Muskegon-Holland, MI MSA #58: TDS Metrocom's network in the Grand Rapids MSA consists of only 11 miles of fiber connecting a hub switch to the SBC/Ameritech tandem through a single additional CO. The network goes nowhere near the cities of Muskegon and Holland which are each approximately 25 miles from Grand Rapids in different directions but are considered part of the MSA. No alternative loop facilities to external customers have been built.
- Ann Arbor, MI MSA #90: See Detroit MSA #6.
- Lansing-East Lansing, MI MSA # 112: At market launch in 2001, TDS Metrocom's network (not including leased facilities) consisted of only 8.5 miles of fiber connecting a hub switch to the SBC/Ameritech tandem through four other central offices. No alternative loop facilities to external customers have been built.
- Kalamazoo-Battle Creek, MI MSA #113: This data point is incorrect. TDS Metrocom owns no fiber facilities in this MSA. A single collocation is served through facilities leased from SBC/Ameritech. No alternative loop facilities to external customers have been built.
- Madison, WI MSA #122: TDS Metrocom's most extensive network exists in the Madison MSA. This is due in large part to very unique circumstances. First, the corporate headquarters of TDS Metrocom and TDS Telecom are located in Madison along with sizable offices of numerous other affiliated companies. These long-term, stable customers allowed for the aggregation of enough traffic to justify deploying interoffice transport links and direct builds. Second, Madison was TDS Metrocom's first market and therefore, capital was plentiful, allowing for a more liberal policy of facilities deployment. This situation has not been replicated in other markets.
- Appleton-Oshkosh-Neenah, WI MSA #141: TDS Metrocom's fiber transport network in the Appleton MSA is widespread. However, very few direct builds to customer locations exist, of which the majority is for extremely high traffic customers such as cellular and data service providers.

13. The expanded descriptions of the TDS Metrocom facilities by MSA listed above should make the Commission wary of basing significant policy decisions on

overly simplistic measures of CLEC activity. Listing active CLECs by name does not provide any information on the actual size and scope of their networks or if they offer wholesale capacity to other carriers. Only through careful analysis of each specific geographic area and the carriers involved can an accurate picture of the state of competition in the interoffice transport market (and high capacity loop market) be developed.

14. Moving on to the portion of the *Report* devoted to local loops (Section IV), the problems begin up front with the statement that "CLECs use their own last mile facilities to serve the vast majority of their large business customers." (*Report* at IV-1) By creative use of assumptions, the *Report* tries to show that between 85%-95% of CLEC business lines are provided over their own facilities. (*Report* at IV-2, Table 1)² In contrast to this absurd estimate, TDS Metrocom provisions just over 9% of its business lines on its own loop facilities. This percentage is continually decreasing over time as access line totals grow while the deployment of new alternative loop facilities has all but ceased. In fact, TDS Metrocom has not been able to justify directly building facilities to a non-affiliated business anywhere outside of its two largest markets, Madison and Northeast Wisconsin.
15. Of great concern to TDS Metrocom is the *Report's* attack on high capacity loops. The *Report* presents a questionably low number of 72,000 UNE DS-1 loops. (*Report* at IV-6, Table 2.) The supporting data in Table 3 shows that in the three states in which TDS Metrocom provides service (Illinois, Michigan and

² One creative assumption is that half of all unbundled loop orders are for residential service. Although TDS Metrocom serves nearly equal amounts of residential and business customers few, if any other facilities-based CLECs are actively courting the residential market. This assumption alone taints the results of the *Report's* analysis of alternative loop facilities.

Wisconsin), 4,270 DS-1 UNE loops have been provisioned by SBC/Ameritech. Based on the number of DS-1 UNE loops for which TDS Metrocom is being billed by SBC/Ameritech, TDS Metrocom accounts for over 40% of all DS-1 UNE loops in these three SBC/Ameritech states and a whopping 95% of the DS-1 UNE loops in the state of Wisconsin.³ Yet, as of June 30, 2001, TDS Metrocom only accounted for a tiny fraction (4.5%) of the CLEC access lines in service in those same three states.⁴ The discrepancy between these data points is too striking to ignore. It appears as though SBC/Ameritech is severely underreporting the number of UNE DS-1 circuits it is provisioning and using it as evidence that few carriers actually use these UNEs.

16. Furthermore, the *Report* inappropriately compares the *number* of DS-1 UNE loops relative to all unbundled loop orders. Even if the *Report's* data on DS-1 UNE loops and overall numbers of UNE loops are correct, ignoring that up to 24 equivalent access lines can be provided over DS-1 UNE loops skews the conclusions. While DS-1 UNE loops may only account for 2% of unbundled loop orders (*Report* at IV-6, Table 2), they may account for up to 36% of access lines provided over unbundled loops.⁵ Furthermore, if you accept the *Report's* dubious assumption that half of all provisioned UNE loops are for residential customers (*Report* at IV-2, Table 1, note) then over 53% of CLEC business access lines that make use of unbundled loops are provisioned over DS-1 UNE loops. The use of and need for unbundled DS-1 loops is critical to the success of competition in the

³ TDS Metrocom billing data as of March 2002.

⁴ Based on TDS Metrocom access line counts and state-by-state totals included in the FCC's Broadband and Local Competition Report covering the same time period.

medium-sized business market⁶ because alternative sources do not exist and self-provisioning to these customers is prohibitively expensive.

17. The *Report* proceeds with an attempt to show that alternatives exist for CLEC access to POTS loops. The most misleading portion of this section deals with direct competitive overbuild of ILEC loops. The section starts by describing the "edge-out" strategy that some small ILECs with CLEC affiliates use to enter RBOC territory through overbuilding loop facilities and lists in Table 4 the CLEC operations of independent ILECs. (*Report* at IV-15 and IV-16, Table 4) While the implication is that all of the CLECs in Table 4, including TDS Metrocom, pursue "edge-out" overbuilding strategies because they are affiliated with ILECs, the reality is far different. TDS Metrocom has done absolutely no overbuilding of POTS loop facilities and it is my understanding that most of the CLECs listed in Table 4, especially the largest ones such as ALLTEL, CenturyTel, CTC Exchange Service and NTELOS among others, do not overbuild POTS loop facilities. Eliminating these larger competitors from the mix of overbuilders leaves a list of tiny rural ILECs/CLECs serving a only handful of communities and customers.
18. The complete overbuild strategy is generally restricted to very limited operations in carefully selected small cities and rural communities. The expenses associated without overbuilding are so enormous that carriers usually need to win 70%-80% of the lines in that community to make the enterprise profitable. This type of competitive entry is impossible to duplicate in any areas with substantial

⁵ 72,000 DS-1 UNE Loops multiplied by 24 Lines per DS-1 = 1,728,000 equivalent access lines. 1,728,000 lines divided by (1,728,000 + 3,000,000 total UNE loops) = 36.5%

⁶ Channelized DS-1 loops can be used to serve business customers with as few as 10-12 lines in many areas.

population for numerous reasons including the time necessary for deployment, the inevitable rights-of-way battles with municipalities and above all else, the lack of access to the astronomical amount of capital necessary to undertake complete overbuilding of POTS loop facilities.

19. More disturbing than all of the data errors in the *Report* is the potential that the *Report's* findings could be used to justify the imposition of high-level triggers like those proposed by SBC in its opening comments to eliminate UNE requirements. SBC proposes three triggers that purportedly measure the amount of competition in the interoffice transport and high capacity loop markets by wire center: 1) 2 or more fiber-based, collocated CLECs, 2) 15,000 business lines and 3) \$150,000 per month in special access revenue. (SBC Comments at 88.)
20. These proposed measures have no direct relationship to the level of competition in a geographic area. As discussed above, each wire center, MSA or market area has very unique characteristics that must be evaluated prior to determining the level of competition in an area. Two fiber-based CLECs may point to a competitive transport market if both provide wholesale transport services, but it could just as easily show a continued lack of competitive alternatives. The measures of business lines and special access revenues are even less connected to the interoffice transport market.
21. For high capacity loops, the existence of fiber-based CLECs in a CO has no relationship whatsoever to the ability to access or build DS-1 facilities. Going back to the example of TDS Metrocom's Grand Rapids market, having a short fiber link between a hub switch and two SBC/Ameritech COs does not make it

any less costly or more efficient to self-provision high capacity loop facilities to businesses unless they are located directly along the fiber route. Even then, there is no rational economic justification for overbuilding facilities to a 10-12 line business that may want a high capacity circuit for its voice and data traffic.

22. The 15,000 business line and \$150,000 special access revenue triggers are just as suspect with respect to high capacity loops. Using the business line trigger, in the following areas TDS Metrocom would immediately or in the near future lose access to high capacity loops (and interoffice transport)⁷:

- Neenah/Menasha, WI: The largest town in this area is the booming metropolis of Neenah with a population of 24,507. Presumably, the reason that this wire center meets the SBC trigger is that Kimberly-Clark Corporation has its world headquarters in the city. In this case a single gigantic business customer has apparently skewed the data. Excluding Kimberly-Clark, the rest of the wire center is more rural and small town than dense metropolitan area.
- Appleton, WI: In this case, geographic size affects the data. This wire center is quite large, covering roughly the same amount of territory as the five separate wire centers that make up the city of Madison which is 3 times as big based on population. Only because it is so large geographically does it meet the SBC trigger. Anyone claiming that competitive transport and high capacity loops are available throughout this wire center clearly has no knowledge of the area.

23. These two examples show just how sensitive high level triggers can be to extraordinary factors. Such triggers should not be used as substitutes for extensive and detailed analyses of the level of competition and alternative facilities in a geographic area. Similarly, analysis that is done by aggregating data over a large geographic areas such as an MSA or LATA masks significant and important differences that exist throughout the areas in question. If the Commission wishes to pursue an accurate granular analysis of UNE alternatives it

must not take short cuts or it will not see a realistic portrait of the state of competition in the marketplace.

24. This concludes my Affidavit.

⁷ The business access line estimates used to identify these wire centers were calculated based on a mix of publicly available data and internal company market research.

Executed this 16th day of July, 2002

A handwritten signature in dark ink, appearing to read "Mark A. Jenn", is written over a horizontal line.

Mark A. Jenn

Susang Schuen
9/22/02

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	
)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions of the Telecommunications Act)	
Of 1996)	
)	
Deployment of Wireline Service Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability)	

REPLY DECLARATION OF EDWARD J. CADIEUX

I, Edward J. Cadieux, pursuant to 28 U.S.C. Sec. 1746, do hereby declare, under Penalty of Perjury, that the following is true and correct:

1. I am employed as Vice President of Regulatory and Public Affairs by NuVox, Inc. ("NuVox"). I have more than 20 years of regulatory, legal and public policy experience in the telecommunications industry.
2. My business address is 16090 Swingley Ridge Road, Suite 500, Chesterfield, Missouri 63017.
3. NuVox is a facilities-based competitive local exchange carrier ("CLEC") and integrated communications services provider. NuVox offers voice, data and ancillary services to small and medium-sized business customers in 30 city markets across 13 Southeastern and Midwestern states. (A list of the markets served by NuVox is attached hereto as Schedule A.) Specifically, NuVox offers local voice and data services, dedicated high speed internet access,

domestic and international long distance services, and a variety of complimentary services including unified voice, e-mail and fax messaging, local area and wide area network management, virtual private networks, website design, web page hosting, audio conferencing and a comprehensive set of web-based applications.

4. NuVox has deployed its own switching and collocation-based transmission equipment, along with thousands of integrated access devices (*i.e.*, specialized customer premises equipment which permits bundled provision of voice and dedicated high speed internet access services over T-1 channels). NuVox has installed 30 ATM data switches and 14 Class-5 digital voice switches, and has 205 equipped and fully operational collocations in Bell Company central offices.
5. The vast majority of NuVox's customers subscribe to a bundled set of services which includes local and long distance voice services and dedicated high speed internet access services. NuVox provisions bundled voice and dedicated high speed internet access services via leased integrated T-1 facilities which connect with NuVox-owned integrated access devices (at the customer's location) and to NuVox's ATM data and digital voice switching equipment at its switching hubs.
6. By combining its own facilities with T-1 facilities leased from the serving ILEC, NuVox provides bundled voice and dedicated high speed internet access services over separate channels of an integrated T-1. Use of traditional T-1 facilities in this manner is efficient and economical, and allows NuVox to

offer customers the convenience of one-stop shopping for combined voice and high-speed internet access services. The efficiency of this configuration allows NuVox to bring both voice services and dedicated high speed internet access service “down-market” – *i.e.*, by combining voice and internet access over an integrated T-1, NuVox is able to offer these services to business customers with as few as five voice lines. The small/medium-sized business market is a market segment that traditionally has been neglected by the serving ILEC. These customers frequently have few, if any, alternatives for high speed internet access.

7. NuVox has expanded its offering of integrated voice and dedicated high speed internet access services beyond its collocation “foot-print” by use of leased, ILEC-combined loop and transport T-1 facilities. Use of ILEC-combined loop/transport T-1 facilities allows NuVox to expand the geographic availability of its bundled voice/dedicated high speed internet access services to those small and medium-sized business customers that are located in central offices where collocation is not feasible. Generally these tend to be the central offices with relatively low business customer density. In these areas, small/medium-sized business customers have limited (if any) alternatives to the serving ILEC for voice and high speed internet services. NuVox’s use of ILEC-combined loop/transport T-1 facilities allows it to reach these customers and offer them competitively-priced voice and dedicated high speed internet access services.

8. NuVox's ability to bring competitively-priced bundled voice and dedicated high speed internet access service to the small/medium-sized business customer segment is highly dependent on its ability to obtain leased T-1 loops and – for customers located outside of NuVox's collocation footprint – ILEC-combined T-1 loop/transport combinations, at cost-based prices. To the extent ILECs are permitted to engage in policies that deny the availability of these facilities as UNEs and instead force NuVox to use tariffed T-1 special access service, the NuVox cost of providing integrated T-1 service is increased to unsustainable levels because ILEC special access services are priced substantially in excess of the economically efficient (*i.e.*, incremental) cost of the facilities.
9. CLEC self-provisioning of transport, while a theoretical alternative, is not a "real-world" option for CLECs under current economic and capital market conditions. As the Commission is well aware, for the last eighteen months the capital markets have been virtually shut-down for the CLEC industry. At same time, growth in the U.S. economy – and in the telecom sector specifically – experienced a precipitous decline. The capital market shut-down has caused CLECs to reduce capital expenditure budgets and scrupulously limit expenditure of those funds to only the most absolutely near-term critical projects. As a general matter, to the extent a CLEC has a transport route which might – under other, more normal conditions – have been a potential candidate for conversion to self-provisioning, consideration of that type of project necessarily has been "mothballed" indefinitely. This is

particularly true for small to mid-sized CLECs like NuVox, where the cost of self-provisioning a transport route would use up a significant piece of its limited cap ex budget. The dollars required upfront for these projects are simply not available under current conditions.

10. Moreover, even if the current constraints on cap ex budgets were less severe, the reduced level of demand growth means that the payback period for such projects is significantly longer than in the past. So for the time being and for the foreseeable future, to assume any meaningful amount of CLEC self-provisioning of transport facilities would be pure fiction, and policies that assume such self-provisioning would be fundamentally flawed. It is also important to recognize that even under more favorable economic conditions, the feasibility of CLEC self-provisioning of transport facilities is inextricably tied to facts that will be specific to particular transport routes (relating both to the cost of the build-out and the level of revenues that can reasonably be expected to be generated from those facilities), such that only the very highest density transport routes would likely be able to prove-up a business case for CLEC self-provisioning.
11. The current, limited extent of deployment of CLEC self-provisioned transport facilities is reflective of the enormity of the task of replicating key portions of the ILEC network against an entrenched monopolist. Even under the most favorable conditions imaginable, such competitive carrier facilities deployment could only occur gradually, over an extended period of years. But that task was made immensely more complicated and costly as a result of the

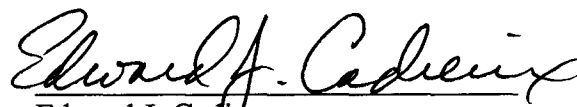
relentless barrage of administrative agency and court challenges launched by the Bell companies against the Telecom Act and the FCC's pro-competitive rules and decisions, and by their incessant foot-dragging regarding compliance with core market-opening obligations. The time lost and the cost imposed on the competitive carrier industry due to the Bell companies' tactics in the years immediately following passage of the Telecom Act has played a significant role in limiting the expansion of CLEC self-provisioned facilities. Similar ILEC tactics continue to this day, now compounded by the chilling effect on capital markets caused by the Bell companies' pervasive lobbying campaign aimed at rolling-back UNE availability generally, and for use with CLEC advanced services in particular.

12. This concludes my declaration.

VERIFICATION

State of Missouri)
) SS
County of St. Louis)

Edward J. Cadieux being duly sworn states that he is the Vice President, Regulatory & Public Affairs for NuVox Communications and that the facts set forth above are true and correct to the best of his knowledge and belief.


Edward J. Cadieux

Subscribed and sworn to before me, this 16th day of July, 2002.



My commission expires:

ELLEN RUBIN
Notary Public – State of Missouri
County of St. Louis
My Commission Expires Mar. 20, 2005

NuVox Markets

- St. Louis, Missouri (and adjoining Illinois portion of metro area)
- Springfield, Missouri
- Kansas City, Missouri (and adjoining Kansas portion of metro area)
- Wichita, Kansas
- Little Rock, Arkansas
- Tulsa, Oklahoma
- Oklahoma City, Oklahoma
- Greenville, South Carolina
- Spartanburg, South Carolina
- Atlanta, Georgia
- Greensboro, North Carolina
- Burlington, North Carolina
- Winston-Salem, North Carolina
- Indianapolis, Indiana
- Akron, Ohio
- Wilmington, North Carolina
- Cincinnati, Ohio
- Columbus, Ohio
- Dayton, Ohio
- Lexington, Kentucky
- Miami, Florida
- Ft. Lauderdale, Florida
- Charlotte, North Carolina
- Raleigh, North Carolina
- Columbia, South Carolina
- Jacksonville, Florida
- Louisville, Kentucky
- Nashville, Tennessee
- Knoxville, Tennessee
- Charleston, South Carolina

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Section 251 Unbundling)	
Obligations of Incumbent Local Exchange	)	CC Docket No. 01-338
Carriers)	
)	
Implementation of the Local Competition)	
Provisions of the Telecommunications Act of	)	CC Docket No. 96-98
1996)	
)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability)	

**Declaration of Bret L. Mingo
Core Communications, Inc.**

1. My name is Bret L. Mingo. I am president and CEO of Core Communications, Inc. ("CoreTel"), a CLEC with substantial operations in Delaware, Maryland, and Pennsylvania. My business address is 209 West Street, Suite 302, Annapolis, MD 21401.
2. As part of my responsibilities, I directly oversee all aspects of CoreTel's provision of telecommunications services, including interconnection with Verizon, provisioning of high capacity special access and PRI services from Verizon and other LECs, and provisioning of interLATA circuits from IXC's. Prior to founding CoreTel in 1997, I consulted to area ISPs regarding provisioning of special access and interLATA circuits from telecommunications carriers.

Purpose of Declaration

3. The purpose of my Declaration is to discuss Verizon's systematic thwarting of CoreTel's efforts to obtain unbundled network elements ("UNEs") in dark fiber form. Specifically,

I will discuss (1) Verizon's refusal to identify where dark fiber exists, (2) Verizon's defining dark fiber so as to make it unavailable as a practical matter, (3) Verizon's refusal to allow dark fiber connection at any technically feasible location, and (4) Verizon's requirement that CLECs collocate in order to combine multiple dark fiber UNEs. In the end, CoreTel believes that Verizon has created a set of rules concerning dark fiber UNEs that makes it practically useless as a means of serving customers.

4. CoreTel's inability to order dark fiber from Verizon has hindered its ability to provide its innovative Ethernet services to customers. This Declaration is based specifically on my experience with Verizon, but I believe that it speaks to the conduct of other ILECs as well. As such, the solutions that CoreTel proposes herein for dark fiber provisioning make sense as a general Commission policy for all ILECs.

**A Game of "Battleship":
Verizon Refuses to Inform CLECs of the Location of Dark Fiber**

5. Basically, the Verizon rules make it virtually impossible for a CLEC to plan and create a network that relies on any dark fiber UNE. First, Verizon will not publish a list of where dark fiber exists. Instead, they require that CLECs ask for dark fiber on a route-by-route basis. Verizon then determines whether dark fiber is available on the route (or to quickly determine that they want to keep it all reserved for future use). Verizon does not have any stated formula or procedure for defining dark fiber. This means that they are able to determine, again on a route-by-route basis, if they have any dark fiber available. I believe that Verizon does not want to lease dark fiber to CLECs and this ordering process makes it easy for them to declare that no dark fiber is available for any route that a CLEC happens to be interested in.

6. I equate the current Verizon rules to the game of Battleship. In Battleship, a player must make repeated wild guesses as to the location of the enemy's ships. The CLEC must do the same thing in the current procedure with dark fiber. Without knowing how Verizon routes its fibers, where they have nodes and access points, where rings exist, etc., the CLEC must place requests that are nothing more than wild guesses as to where dark fiber might exist. If the CLEC guesses wrong then they can't get dark fiber. This doesn't mean that there isn't a dark fiber solution available, it just means that the specific request that the CLEC made won't work. There might be several alternatives that would supply the same solution, but the CLEC can never know this. However, if they knew more about the Verizon network they might have been able to create a solution, or part of a solution using the dark fiber UNE. As it works today, the process is heavily stacked against the CLEC for ever getting dark fiber in a reasonable time frame.
7. What this means is that in order for a dark fiber UNE to be usable, the procedure for obtaining dark fiber must be clearly defined and have some reasonable chance of timely success. Verizon's current process is a black hole in that the rules are unclear and in that a CLEC has no idea if there is any chance of success when ordering dark fiber.
8. This is why CoreTel thinks that it is essential for the Commission to adopt specific requirements to govern ILEC provisioning of dark fiber. First, the Commission should adopt a clear and complete definition for dark fiber. Any such definition needs to define very clearly how the ILECs reserve fiber pairs to account for future growth and for spare capacity on any given fiber route. Absent such specific rules, it is far too easy for ILECs to declare that any route that a CLEC wants has no spare dark fiber capacity. In addition,

without defined rules, the ILECs are able to define the rules on a route-by-route basis and keep dark fiber away from CLECs.

9. The second requirement that the Commission should adopt is that ILECs must periodically publish a list of routes that contain dark fiber, based upon the dark fiber definition mentioned above. Verizon has stated in other proceedings that publishing an inventory of dark fiber would be too difficult. However, there are ways to publish such a list without creating such difficulties. For example, ILECs could publish a list periodically, say every six months or a year. We don't see that it is necessary that they keep such a list totally updated at all times – it's more important to CoreTel that we have some indication of where dark fiber exists. We don't think that the overall amount of dark fiber in the ILECs' networks changes rapidly, and a periodic list should be sufficient to assist CLECs in network planning. We understand that things change in the network and that sometimes fiber that was thought to be spare might suddenly find a use. However, we know that scattered throughout the network is a tremendous amount of dark fiber. There are a number of reasons for dark fiber to exist that I won't elaborate here, but it exists in every fiber network ever built. The FCC has required ILECs to maintain similar availability information for items such as collocation space, and there is simply no reason why similar information could not be made available for dark fiber.
10. Absent these two requirements for dark fiber provisioning, we don't believe that CoreTel or any other CLEC will ever have much luck in realistically using dark fiber.

Verizon Permits Access to Dark Fiber Only at “Accessible Terminals”

11. Verizon refers to points where electronics exist in the fiber network today as “accessible terminals” and they believe that these are the only places where CLECs should have

access to the dark fiber UNE. However, in addition to “accessible terminal” locations, a fiber network will contain other planned and functional splice points. These are locations where easy access to the fiber has been designed and created so that the fiber can easily be tapped at a later date. I would like to refer to such locations as “designed access points”. Such locations don’t necessarily have any current splices at them and the fiber may even pass through these places uncut today. However, these locations have been built to afford easy future access.

12. There are a number of ways to design easy access to a fiber and I expect that all of these various access methods can be found within the network. One common type of hardware one might see at a designed access point is a handhole. This is a small device that allows one to peer inside the sheath and actually look at and work on the fiber pairs. This is the most common type of access device built into most fiber networks. However, there might also be designed access points in manholes, in field cabinets, at large customer sites and other such places where the engineers have designed for future access to the fiber. CoreTel believes that these “designed access points” are, by definition, locations where connection with the ILEC fiber network is technically feasible. These locations were designed specifically to allow easy access to the fiber in the future as needed.

Verizon, for example, routinely taps into these designed access points as they expand the fiber network to meet customer demands. As such, they are “technically feasible” points of interconnection.

13. I think it is clear that Verizon’s definition of technically feasible connection point is too narrow. I believe that CoreTel’s definition of “designed access point” is more in line with the intent of the Act and should be the provisioning standard throughout the nation.

Such points are, by definition, technically feasible for interconnection because they were designed for just that purpose. CoreTel should be able to connect to dark fiber at a handhole, a basement, a hut where the fiber has clearly been designed for easy access – and the existence, or non-existence of current electronics should have nothing to do with CoreTel’s access. By definition, each party will use the network in a different way, and CoreTel’s most effective use of a dark fiber UNE should not be restricted by the way that the ILECs’ engineers have elected to access the lit pairs on the fiber. Dark and lit fiber pairs, by definition, have nothing to do with each other.

14. In addition, Verizon’s “accessible terminal” requirement precludes CLECs from accessing dark fiber “curls.” A dark fiber curl is fiber that has been run from location A to location B, but is not connected to an access device, such as a fiber panel. Under Verizon’s policy, it would never have to provide a CLEC with access to dark fiber unless that dark fiber was connected to a patch panel or similar accessible terminal. This, of course, enables Verizon to deny access to dark fiber left in curls, for no reason other than to warehouse it until Verizon wishes to use it for itself.
15. The Commission should therefore tighten its definition of dark fiber to include any portion of a transmission facility not connected to an access device. Absent this explicit instruction, ILECs may continue to refuse to provision unused dark fiber on the basis of their own caveats and labels that are designed to keep dark fiber unavailable.

Verizon Will Only Provision Dark Fiber as a “Continuous Path”

16. Verizon has taken the position that CoreTel would need to collocate at any location where they want to connect two dark fiber segments. I believe that this requirement is

completely unreasonable (as well as contrary to the Commission's unbundling rules) and want to demonstrate how such a requirement creates a barrier to effective competition.

17. This issue hails back to an issue I mentioned earlier – how a CLEC might create a usable path between two points. The attached chart illustrates a practical example: Suppose that Path 1 is a direct fiber path that connects between the two locations. Ideally there would be dark fiber available on this path. However, let's also suppose there isn't, but that dark fiber exists on Path 2 that happens to connect through multiple ILEC locations between Point A and Point B.
18. Verizon says they would not complete the order for a dark fiber UNE on Path 2 unless there was a clear unbroken line of fiber between Points A and B. Let me show why this makes no practical sense. First, accept my assumption that Path 2 can be created by using existing Verizon (or any ILEC) fiber – each of the legs on Path 2 is on Verizon fiber. However, the ILEC may or may not have a continuous lit path on this route – it might be lighting different legs of this route with different electronics and there may be no continuous fiber optics signal on Path 2. I don't believe that a lit ILEC path is a necessary precursor to allowing a CLEC to get dark fiber on Path 2. Let's further assume that at one or more places on Path two that the fiber is not physically connected. The fiber is present that can complete this path, but it doesn't happen to be spliced together.
19. How could the CLEC make a practical dark fiber circuit out of Path 2? Very simply, the CLEC could order a dark fiber UNE for each of the unbroken legs that make up Path 2. The ILEC would then have the CLEC collocate at each place where the fiber is not connected in order for the CLEC to effectuate a fiber "jumper" or a very short splice needed to connect the ends of the different dark fiber UNEs.

20. Why isn't Verizon's collocation requirement practical? There are two reasons. First, there is no need to mandate collocation to run a basic jumper cable. Second, handholes are small devices and they could easily be located at some place where the CLEC would be unable to obtain collocation space close enough to be effective. These handholes could be on a pole, underground or located on property where the CLEC can't get access. In such cases collocation may be impossible, and thus the dark fiber route could not be created by the CLEC. Also note that one of the splice points is at a customer location. This customer is not obligated to allow the CLEC to collocate there and probably would not do so.
21. In asking for this jumper is the CLEC asking for something that the ILEC would never do for themselves? Of course not. In fact, in this same example, an ILEC might well have created such jumpers to create a lit circuit on Path 2 without bothering to splice the unused dark fiber pairs. Whenever an ILEC needs to join two pieces of fiber together in the field they obviously do so – there are no engineering or technical reasons why they wouldn't do so.

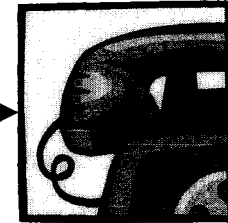
I, Bret L. Mingo, do declare pursuant to 29 U.S.C. § 1746 that the foregoing statements
are true and correct.

7/17/02
Date

Bret L. Mingo/saj
Bret L. Mingo
President and CEO
Core Communications, Inc.

Point A

Point B



Path 1

Hand hole



Hand hole



Path 2

